IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1653

FILED
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MICHAEL RODAK, JR.

SUMMA CORPORATION and HOWARD R. HUGHES,

Petitioners,

v.

TRANS WORLD AIRLINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

Petitioners Summa Corporation[1] and Howard R. Hughes pray that a writ of certiorari issue to the Supreme Court of the State of Delaware to review its judgment and decision that affirmed the denial of a motion to dismiss the complaint of respondent Trans World Airlines, Inc. ("TWA"). Petitioners made this motion on the ground, *inter alia,* that a final judgment of the United States District Court for the Southern District of New York barred the Delaware action. The federal judgment was entered pursuant to the decision and mandate of this Court in *Hughes Tool Company* v. *Trans World Airlines, Inc.*, 409 U.S. 363, *rehearing denied,* 410 U.S. 975 (1973).

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[1] In December, 1972, "Hughes Tool Company" changed its name to "Summa Corporation." It is referred to in the proceedings in the Supreme Court of Delaware by its prior name and for convenience is referred to herein as "Toolco."

Opinions Below

The opinion of the Supreme Court of Delaware, review of which is sought, is not as yet reported. It is set forth at App. 21a.[2]

The opinion of the Court of Chancery is reported at 317 A.2d 114 (App. 1a).

The decision and order of the United States District Court for the Southern District of New York directing the dismissal of the federal complaint is reported at 359 F.Supp. 783 (App. 39a).

Jurisdiction

The Supreme Court of Delaware rendered its decision on February 26, 1975. A timely petition for rehearing was filed on March 17, 1975, and denied on April 1, 1975 (App. 37a). The judgment was entered on that day (App. 38a).

Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1257(3). The courts of Delaware are required to give full faith and credit to a federal judgment. The highest court of the State of Delaware has finally determined that the judgment of the federal court does not bar an action on the same claims under a different legal theory. This determination is subject to review by this Court. *See* 1B J. Moore, *Federal Practice*, ¶ 0.406[1] (2d ed. 1974).

The Delaware courts have, in effect, amended a judgment entered by a federal court, on mandate from this Court, by giving to that judgment a less preclusive effect than the

[2] Citations to the Appendix to this petition are in the form "App. ——a." References "Del. App. A ——" are to Appellants' Appendix in the Supreme Court of Delaware.

federal law of res judicata requires. Although the effect to be given by a state court to a judgment of a federal court is not expressly covered by the Full Faith and Credit Clause nor by 28 U.S.C. § 1738, it has easily been read into the law. *Stoll* v. *Gottlieb*, 305 U.S. 165, 167, *rehearing denied*, 305 U.S. 675 (1938); *Hazen Research, Inc.* v. *Omega Minerals, Inc.*, 497 F.2d 151, 153 n. 1 (5th Cir. 1974).

The judgment of the Supreme Court of Delaware possesses the requisite finality for review at this time.

> The importance of preserving the integrity of federal court judgments cannot be overemphasized—out of respect for the federal courts and for the policy of bringing litigation conclusively to an end. If state courts could eradicate the force and effect of federal court judgments through supervening interpretations of the state law of res judicata, federal courts would not be a reliable forum for final adjudication of a diversity litigant's claim.

Aerojet-General Corp. v. *Askew*, 511 F.2d 710, 716 (5th Cir. 1975). *See also Kern* v. *Hettinger*, 303 F.2d 333, 340 (2d Cir. 1962). If this is true of federal judgments in a diversity case, how much more true it must be of a federal judgment in a federal-question case.

Congress recognized the importance of preserving the integrity of federal court judgments when it amended the Anti-Injunction Act, now 28 U.S.C. § 2283, in 1948, to allow a federal court to enjoin state proceedings "to protect or effectuate its judgments." As the Reviser's Note to the 1948 revision says, this "restores the basic law as generally understood and interpreted prior to the Toucey decision." In his dissent in *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, 141 (1941), which was made the law again by the 1948 change, Justice Reed lamented that

> [the] alternative is that a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of res judicata which is to be examined by another court unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication. [314 U.S. at 144]

Here the state court has applied its own principles of res judicata, in disregard of the federal principles, in order to reject the plea.

Delaware is free to adopt whatever notions of res judicata it may choose with regard to the judgments of its own courts, but it may not do so for judgments from other states and it cannot defeat the supremacy of federal law by doing so for a federal court judgment in a federal-question case.

These principles are true of judgments of all federal courts but must be especially true of a judgment on mandate from this Court. "One of the strongest policies a court can have is that of determining the scope of its own judgments." *Kern* v. *Hettinger*, 303 F.2d 333, 340 (2d Cir. 1962). Only this Court can determine authoritatively what it held in 1973, and "[n]o one, except this Court, has authority to alter or modify [its] mandate." *Cascade Nat. Gas Corp.* v. *El Paso Nat. Gas Co.*, 386 U.S. 129, 136 (1967).

Whether or not petitioners ultimately win in the courts of Delaware, rights that the federal judgment secures to them will have been destroyed. The federal judgment secures to petitioners the essential right to be free of litigation on the same claim or cause of action, both on

the grounds on which it has been litigated and on any ground on which it could have been litigated in the prior action.[3] This right is completely separated and independent of the merits of the second action. *Cf. State of Georgia* v. *Rachel*, 384 U.S. 780, 805 (1966). Because this right will be lost irreparably, "it will be too late effectively to review the present order" when the Delaware litigation is finally decided. *See Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *cf. Local No. 438* v. *Curry*, 371 U.S. 542 (1963).

Even if the decision of the Delaware Supreme Court were to be viewed as but one step in the Delaware litigation instead of a final determination denying an independent federal right, still it possesses the necessary finality for review under the standards set forth in *Cox Broadcasting Corp.* v. *Cohn*, —— U.S. ——, 95 S.Ct. 1029, 1040 (1975). "[T]he federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on nonfederal grounds . . . ." Reversal "would be preclusive of any further litigation on the relevant cause of action. . . ." "[R]efusal . . . to review

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[3] The doctrine of res judicata is "a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect." *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917). The doctrine "reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion . . . . And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties. . . ." *Angel* v. *Bullington*, 330 U.S. 183, 192-193 (1947). The doctrine "puts an end to the cause of action, which cannot be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment." *Comm'r* v. *Sunnen*, 333 U.S. 591, 597 (1948).

. . . will seriously erode federal policy" as well as destroying the rights granted petitioners by the federal judgment. *Idem.*

Moreover, if ever there was a case in which immediate rather than delayed review would best avoid "the mischief of economic waste and of delayed justice" (*Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945)), it is this one. Every pragmatic consideration dictates review at this time.

This "20th Century sequel to Bleak House" will celebrate, if that is the word, its fourteenth anniversary on the day this petition is filed. The dissenting opinion of Mr. Chief Justice Burger, on the last occasion this interminable litigation was before this Court, recites the tortuous history, the thousands of hours of lawyering, the tens of millions of dollars of legal expenses that the parties incurred in the federal action before this Court told the parties "that on the facts there is no liability. . . ." (409 U.S. at 411, 412). Now the Supreme Court of Delaware has told the parties that the opinion of ths Court "in no way deals with the merits of the claims" (App. 30a) and has instructed them to go back to square one and start over.

Question Presented

Does a state court deny full faith and credit to a federal judgment when it refuses to dismiss, on res judicata grounds, the same claims under a state-law theory that have been finally determined adversely to the plaintiff in a federal court on a federal theory?

Statutory Provisions Involved

The statutory provisions involved are set forth in the Appendix beginning at page 44a. They include the following:

1. United States Code, Title 28, Section 1738;
2. United States Code, Title 49, Sections 1378 and 1384 (Federal Aviation Act §§ 408, 414);
3. Federal Rules of Civil Procedure, Rule 41.

Statement of the Case

Fourteen years ago TWA filed, in the United States District Court for the Southern District of New York, a complaint (Del. App. A111-A142) in which it sought damages for injuries to its business because of the alleged use by Toolco and Hughes of Toolco's 78% stock interest in TWA to dictate the manner and method by which TWA acquired and financed flight equipment.

The management of TWA, installed by lender-controlled Voting Trustees, determined for tactical reasons to sue on an antitrust theory. The availability of divestiture as a remedy to solve what the new management viewed as "the Hughes problem", coupled with the belief that an antitrust action would be easier to settle because "the best people were defendants in antitrust actions", constituted the principal reasons for this decision (Del. App. A95). In addition, the complaint in the federal action contained a tort claim, brought under the doctrine of pendent jurisdiction, for interference with TWA's business subsequent to the Voting Trust.

Almost two years thereafter, TWA filed a complaint (Del. App. A7-A33) in the Court of Chancery in Delaware,

avowedly because Hughes had not been served or appeared in the federal action and TWA had been unable to serve a subpoena upon him to take his deposition as a witness (Del. App. A98-A99). TWA obtained Hughes' appearance through sequestration of his stock in TWA.

TWA has conceded that the subject matter of the Delaware complaint was embraced within the federal action (Del. App. A99). What in the federal action was alleged to have constituted exclusive dealing in violation of the antitrust laws, in the Delaware action is claimed to have constituted an assumption of TWA's corporate opportunities in violation of fiduciary duties. In addition to injunctive relief, subsequently mooted by Toolco's sale of its TWA stock, the Delaware complaint seeks an accounting for TWA's damages to its business because of the manner in which TWA under Toolco control acquired and financed flight equipment. The damages to TWA's business that are alleged are exactly the same as those that were alleged in the federal complaint.

When TWA obtained an order for the entry of a default judgment in the federal action, subject to a determination of damages, the Delaware action was relegated to limbo. TWA was content to have it remain there for ten years: during the interlocutory appeal from the order for default judgment; while this Court granted certiorari and then, after argument dismissed the writ as improvidently granted; during a damage hearing at which TWA had every opportunity to prove whatever damages it could based on its complaint but introduced no damages relevant to its common law claim; after a judgment in TWA's favor had been entered and during a second appeal to the Second Circuit and subsequent review by this Court. Only when this Court reversed the judgment in favor of TWA with directions to dismiss the complaint, did TWA seek to revive the Delaware action and to start again.

After this Court denied TWA's Petition for Rehearing, in which TWA did not raise any questions as to the effect of the dismissal on state-law claims, TWA applied to the District Court for an order of dismissal of the federal complaint that would either be without prejudice or without prejudice to state-law claims. The District Court termed this request an effort "to enter a judgment in this action on remand from the Supreme Court which would have the effect of amending the mandate of the Court." (359 F.Supp. at 784; App. 40a). The District Court stated that under Rule 41(b) of the Federal Rules of Civil Procedure a dismissal of the complaint, certainly as far as the federal claims are concerned, would be upon the merits. It said that the dismissal would not necessarily be on the merits as to state-law claims. It concluded, nevertheless, that the "mandate in this case clearly calls for a dismissal of the complaint and this court must enter such a judgment." (359 F.Supp. at 785; App. 43a).

Based on the federal dismissal, Summa and Hughes moved to dismiss the Delaware action. The Court of Chancery denied the motion. It held that the judgment of dismissal in the federal action was not a valid and final personal judgment because the sole question determined by this Court was that "defendant was not subject to liability under the anti-trust law because of the approval by the Civil Aeronautics Board of Hughes Tool Company's dealings . . . as being in the public interest. . . ." (317 A.2d at 121; App. 12a). The Supreme Court of Delaware affirmed, holding that the decision of this Court "was not on the merits of the *same claims* alleged here to be a violation of Delaware fiduciary law", even though it was "on the merits" of the federal claims (App. 26a; emphasis supplied).

Reasons For Granting the Writ

The decision of the Delaware Supreme Court represents a startling departure from, and is in direct conflict with, established principles as announced in the decisions of this Court and as applied in decisions of lower federal courts. It introduces grave uncertainties in an area of the law in which certainty is particularly important. Its rationale—that this Court's decision did not adjudicate the merits of the controversy between TWA and Toolco—not only is at variance with reason and authority, but would permit the relitigating of a claim on a new theory whenever the prior adjudication may not have determined the claim on that new theory.

The consequence for these petitioners is that the vast effort and expense that they incurred in defending against TWA's claims on the only theory that TWA elected to pursue has gone for nought and they are now forced to start all over to defend against the same claims a decade and a half after they were first asserted.

The consequence for sound judicial administration is that a plaintiff may always be permitted a second chance if a federal claim is dismissed for whatever reason so long as the decision is on a ground that does not determine the claim on the new state-law theory, with a resulting multiplicity of litigation and of vexatious and harassing actions.

A

Permitting TWA to relitigate the same claims on a theory it chose not to advance in the federal action cannot be squared with fundamental principles of the law of res judicata as announced in decisions of this Court and applied in a host of cases. Over seventy years ago this

Court held, in *United States* v. *California & Oregon Land Co.*, 192 U.S. 355 (1904), that a plaintiff is bound to bring forward all the grounds it has for the relief that it seeks upon pain of being barred on all grounds, whether or not advanced, if the action is dismissed. It so held because "the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim . . . and, *a fortiori,* he cannot divide the grounds of recovery." (192 U.S. at 358). This tendency has not grown less over the years.

Here, as in *California & Oregon Land Co.*,[4] the original action was brought under a federal statute and the action was dismissed because of an affirmative defense to the statutory action. Here, unlike in *California & Oregon Land Co.*, the defense had relevance to the action on the new theory, for the Delaware decision recognizes that the courts of Delaware must "give deference to all that the CAB approves within the jurisdiction assigned to it by Congress." (App. 35a). Here the precise question decided in an antitrust context by this Court is now to be litigated, *ab initio,* in the context of a claimed breach of a fiduciary duty.

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[4] In *California & Oregon Land Co.* the original action was founded upon a federal statute. Pursuant to this statute, the United States sought forfeiture of certain land patents. The statute authorized the court to render judgment of forfeiture "saving and preserving the rights of all bona fide purchasers . . . if any such there be." The defendant pleaded, *inter alia,* that it was a bona fide purchaser and this defense was upheld and the bill in equity dismissed. The United States then brought a second action on the ground that the lands were within an Indian reservation and, therefore, had never been granted to the defendant's predecessor in title. It was this claim that this Court held was barred by the prior judgment even though the theory was completely different and different factual questions were presented.

The teaching of *California & Oregon Land Co.* has been applied to a great many factual situations to bar relitigating the same claim on a new theory. *See, e.g., Williamson* v. *Columbia Gas & Electric Corp.*, 186 F.2d 464 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951); *Norman Tobacco & Candy Co.* v. *Gillette Safety Razor Co.*, 295 F.2d 362 (5th Cir. 1961); *Grace* v. *Grace*, 394 F.2d 127 (2d Cir. 1968); *C & C Products, Inc.* v. *Fidelity & Deposit Co.*, 512 F.2d 1375 (5th Cir. 1975). Any other result would destroy the familiar doctrine that res judicata bars litigating the same cause of action on any grounds that could have been litigated in the prior action. The decision of the Delaware Supreme Court, if it remains as a statement of the law, will put an end to that doctrine in state courts as applied to a federal judgment. Only the issues actually litigated will be precluded and rights secured by the federal judgment are destroyed.

B

The decision imparts tremendous uncertainty into an area of the law that has as one of its main purposes "the establishment of certainty in legal relations." *Comm'r* v. *Sunnen, supra*, 333 U.S. at 597. The establishment of certainty in legal relations requires a rule that draws a clear line between dismissals that operate as an adjudication on the merits and those that do not. Rule 41(b) of the Federal Rules of Civil Procedure supplies this need but the Delaware court refused to apply it. Instead, the Delaware court held, without reference to rule or authority, that the federal dismissal was not on the merits and, therefore, not to be given res judicata effect.

This Court may be surprised to learn that its decision in the federal action "in no way deals with the merits of the claims." (App. 30a). One may ask, incredulously,

what a decision that "on the facts there is no legal liability" (409 U.S. at 412) does deal with, if not the merits. The affirmative defense that this Court upheld went directly to the merits. This defense dictated the reversal of the judgment in favor of TWA and the dismissal of the action. There was nothing left to be litigated.

Closing its eyes to the fact that courts decide cases on the legal theory that the parties advance, the Delaware court on the one hand recognized that this Court's decision and the subsequent dismissal operated as an adjudication on the merits of the federal claims and on the other held that the decision and dismissal were not "on the merits" of the controversy. In so doing, the Delaware court substituted for the relatively simple and certain standard of Civil Rule 41(b) a vague test that finds no support in the authorities and that would permit relitigating a claim whenever in a court's view the grounds of the prior decision did not adjudicate the controversy even though it adjudicated the claim. Apparently, even when the claims are the same and only the theory of recovery differs, a plaintiff is free to start again unless the issue that was actually litigated and determined adversely to the plaintiff, whether of fact or law, bars the claim on the new theory. For, if that is not the result, then what does the distinction between claim and controversy mean?

The Delaware court's novel and unsettling view of the rights secured to a defendant by a federal judgment is in plain conflict with such decisions as *Williamson* v. *Columbia Gas & Electric Corp., supra*. There the plaintiff brought two actions, one for a continuing conspiracy in violation of Sections 1 and 2 of the Sherman Act and a second for the same alleged injury but without the conspiracy allegations, under Section 7 of the Clayton Act. The claim under the

Clayton Act was dismissed on the ground that it was barred by the Delaware statute of limitations. The court then dismissed the Sherman action even though the limitations defense would not be a bar on the continuing conspiracy theory. The Third Circuit gave short shrift to the contention that the dismissal on limitations grounds was not "on the merits", even though, quite obviously, it did not determine the merits of the controversy as opposed to the "cause of action." In holding that the "cause of action" was the same, Judge Goodrich stated for the court:

> Does action No. 1 differ from action No. 2 because the conspiracy charged in action No. 1 is alleged to be a continuing one? In a civil conspiracy suit each invasion of plaintiff's interest resulting from the conspiracy creates a new cause of action when the question is the application of the bar of the statute of limitations. *This rule would be controlling if the issue here was whether the statute of limitations bars all or a part of the damages claimed by plaintiff as a result of a continuing conspiracy. But if the cause of action is the same, the principle of res judicata prevents our reaching that question, not because it was actually decided in action No. 2, but because the judgment is a final determination of not only what was actually in issue but what might have been in issue had it been raised.* . . . [186 F.2d at 469; emphasis supplied].

Since the Supreme Court of Delaware recognized that TWA asserted "the same claims" in both actions, the conflict with *Williamson* is simple and direct. "[T]he whole tendency" of modern procedure "to require a plaintiff to try his whole cause of action and his whole case at one time" has been reversed. *United States* v. *California & Oregon Land Co., supra,* 192 U.S. at 358. The Delaware court has substituted issue preclusion for res judicata with devastating effect to the long-established rule that a plaintiff cannot divide his grounds of recovery and leave one in reserve in case he is unsuccessful on the first try.

The decision in Delaware may not be dismissed as an aberration, on the theory that in what it viewed as a hard case, the Supreme Court of Delaware has made bad law. The law that it has made is there to be followed, both in a state in which a great deal of important litigation is conducted and under the laws of which so many major corporations are incorporated and in other states as well. *The temptation will be great for plaintiffs to bring claims in the federal courts on federal theories, secure in the knowledge that if they fail they can try again on a state-law theory that they have held in reserve.*

If the decision is not reviewed by this Court and thus remains as an authoritative statement of the law in this important area, "our federal system would afford fine opportunities for needlessly multiplying litigation in this way." *Angel* v. *Bullington,* 330 U.S. 183, 192 (1947). The doctrine of res judicata would no longer be "a barrier against it." (*Idem*).

C

The decision's treatment of pendent jurisdiction compounds the confusion introduced into this field of the law in which certainty is so important. In rejecting the contention that in the federal action the claims could have been asserted under the theory of breach of fiduciary relationships, the Supeme Court of Delaware has given a novel interpretation to this Court's opinion in *United Mine Workers of America* v. *Gibbs,* 383 U.S. 715 (1966), that will enormously reduce the utility of pendent jurisdiction as a means of adjudicating claims that arise from a common nucleus of fact, and that for reasons of judicial

economy, convenience, and fairness to litigants should be adjudicated in one proceeding.

This Court has not dealt directly with the res judicata effect of a federal judgment on a claim on a federal theory upon a subsequent action brought in a state court on a state-law theory. Unless piecemeal litigation is to be encouraged and the tendency of the law to require the whole controversy to be tried in one place at one time is to be arrested and reversed, then the effect of the federal judgment must be to bar the claim on the state-law theory so long as it could have been advanced under the court's pendent jurisdiction, "unless it is clear that the federal court would have declined as a matter of discretion to exercise that jurisdiction. . . ." *Restatement (Second) of Judgments* § 61.1, p. 100 (Tent. Draft, No. 1, 1973). For "in cases of doubt, it is appropriate for the rules of res judicata to compel the plaintiff to bring forward his state theories in the federal action, in order to make it possible to resolve the entire controversy in a single lawsuit." (*Idem*, p. 117).

The Supreme Court of Delaware held precisely the opposite. It recognized that since the federal court did exercise jurisdiction over the state-law claim that TWA in fact advanced for tortious interference, the matter was not free from doubt. It resolved all doubts in favor of TWA, in order to give it its day in court, after twelve years spent in court litigating the claims on TWA's chosen theories. It did so on a basis that is not supported by either reason or authority.

To the Supreme Court of Delaware the controlling consideration was this Court's opinion in 1973. Because of this opinion, "it would elevate speculation over reality to now dispose of this case by theorizing about what might have been (had the State claims been raised pendently in

1961)." (App. 32a). After all, "if an action for an alleged violation of an anti-trust statute is now filed in a Federal Court and if the transactions in question have been approved by the CAB, there can be no doubt that the complaint will be dismissed and, under *Gibbs*, the Court will *not* assume jurisdiction of pendent (state) claims." (App. 30a-31a). Thus, "the result of the Supreme Court opinion (which in no way deals with the merits of the claims) surely gives [the] effect of a dismissal before trial", even though "in one sense the TWA claims in the Federal Court were not dismissed before trial. . . ." (App. 30a). And thus, too, in any case in which a federal court ultimately determines that the claim on the federal theory should have been dismissed, even after twelve years of litigation, the plaintiff can always start again. Gone are the considerations of economy and convenience that are the basis for pendent jurisdiction in the first place.

The decision of the Delaware Supreme Court is particularly important because this is an area in which there are few authoritative decisions in either state or federal courts. The restrictive view taken defeats the purpose of the doctrine. Even if federal claims may be subject to dismissal, "it is evident from *Gibbs* that pendent state law claims are not always, or even almost always, to be dismissed and not adjudicated. On the contrary, given advantages of economy and convenience and no unfairness to litigants, *Gibbs* contemplates adjudication of these claims." *Hagans* v. *Lavine*, 415 U.S. 528, 545 (1974).

Moreover, here, as in *Gibbs*, there would have been a special reason for the exercise of pendent jurisdiction. An important federal question would have been presented as to whether the orders of the CAB under Section 408 of the Federal Aviation Act, which this Court held were a defense to the claims on an anti-trust theory, were also a defense,

under Section 414 of the Federal Aviation Act, to the claims on a common-law theory. Had TWA pleaded its theory of breach of fiduciary duty at the outset as a pendent claim and had the District Court held that the antitrust claim was barred because of CAB approval and dismissed that claim, it is certainly not clear, and indeed is all but inconceivable, that the federal court would have dismissed the state-law claims so that the state courts might determine the extent to which CAB approval furnished a defense to these claims.

Because TWA split its grounds of recovery, years more may be spent in wasteful litigation before the extent to which the CAB orders defeat TWA's claims on the new theory is determined. This sort of piecemeal litigation is exactly what the doctrine of pendent jurisdiction is designed to prevent. The whole matter should have been adjudicated in one action. It could have been adjudicated in one action had TWA not elected to divide its grounds of recovery. The decision of the Delaware Supreme Court can only encourage others to do the same.

CONCLUSION

For the reasons stated, the writ should be granted and the judgment of the Supreme Court of Delaware should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

In the
Court of Chancery of the State of Delaware
In and For New Castle County
Civil Action No. 1607

Trans World Airlines, Inc.,

Plaintiff,

v.

Howard R. Hughes and Hughes Tool Company,

Defendants,

and

The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, Irving Trust Company, Dillon, Read & Co., Inc., James F. Oates, Jr., Harry C. Hagerty, Ben-Fleming Sessel, Ernest R. Breech and Charles C. Tillinghast, Jr.,

Additional Defendants on Counterclaims.

February 19, 1974

Louis J. Finger of Richards, Layton & Finger of Wilmington, and Dudley B. Tenney, Paul W. Williams and Marshall Cox of Cahill Gordon & Reindel of New York, New York, for plaintiff.

George Tyler Coulson of Morris, Nichols, Arsht & Tunnell of Wilmington, and Chester C. Davis and Maxwell

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E. Cox of Davis & Cox of New York, New York, for defendants.

William Prickett of Prickett, Ward, Burt & Sanders of Wilmington and Cravath, Swaine & Moore of New York, New York for the additional defendants the Equitable Life Assurance Society of the United States and Metropolitan Life Insurance Company and Harry C. Hagerty.

William S. Potter of Potter, Anderson & Corroon of Wilmington appearing specially for the additional defendant Irving Trust Company.

Leroy A. Brill of Bayard, Brill & Handelman of Wilmington, and Sullivan & Cromwell of New York, New York for the additional defendant Ernest R. Breech.

Carl Schnee of Tybout, Redfearn & Schnee of Wilmington for the additional defendant Charles C. Tillinghast, Jr.

MARVEL, Vice Chancellor: On June 30, 1961, Trans World Airlines, Inc., the plaintiff in this later filed action, instituted an anti-trust suit for treble damages in the District Court of the United States for the Southern District of New York against Howard R. Hughes, Hughes Tool Company, and Raymond M. Holliday, an official of the corporate defendant and a director of plaintiff, which complained of injuries allegedly suffered by plaintiff as a result of the improperly administered control exercised over the affairs of such corporation by the defendants Howard R. Hughes and Hughes Tool Company, which latter corporation (all of the stock of which was owned by Mr. Hughes) had prior to the inception of such federal action held an unfettered controlling 78% interest in the voting shares of the plaintiff.

Appendix "A"

The gist of the charges levelled against Hughes Tool Company and others in such action was that as a condition precedent to the furnishing of financial aid to plaintiff, Hughes Tool Company and others associated with it, had required that plaintiff acquire its needed aircraft solely through such defendant corporation and was thus caused to boycott all other suppliers of aircraft. Further complaint was made that plaintiff had been improperly forced by Hughes Tool Company and others associated with it to acquire needed aircraft through borrowings rather than through equity financing.

The complaint in question consisted of two federal claims alleging violations of federal anti-trust laws together with a third pendent state claim which alleged tortious interference by defendants with the business of TWA, which claim was based on the same facts pleaded in the first and second claims.

The complaint in this suit, which was filed on April 18, 1962, alleges substantially the same facts as those set forth in the federal complaint, the relief sought herein, however, being based on equitable principles governing the conduct required of corporate officers and majority stockholders in their dealings with their corporation, such action claiming breaches by the named defendants of their fiduciary duty to plaintiff and its minority stockholders.

This is the decision of the Court on the motion of the defendants to dismiss the pending complaint on the grounds of res judicata and collateral estoppel as well as under the provisions of Rule 41(b), and, in the alternative, on the ground that approval by the Civil Aeronautics Board of business dealings between TWA and its controlling stockholder, Hughes Tool Company, here in issue,

has resulted in the granting of immunity to defendants from this suit on the basis of the provisions of section 414 of the Federal Aviation Act, 49 U.S.C. §1384,[1] defendants contending that the operative facts on which plaintiff relies in this case are substantially the same as those relied on in the federal litigation and that plaintiff may not be permitted to retry the consequences implicit in a prior ruling based on such facts merely because a different legal theory is now being pursued. Also ready for decision is the motion of the additional defendants for dismissal of the counterclaims asserted against them by the corporate defendant on the ground that such claims are also barred by the principle of res judicata.

Litigation between TWA and defendants, concerned with the control exercised over TWA by Hughes Tool Company by reason of the eventual ownership by Hughes Tool Company of 78% of TWA's voting stock, began, as noted above, in 1961, following the deposit of Hughes Tool Company's TWA stock in a voting trust, by the filing of an anti-trust action by TWA in the Federal District Court of the United States for the Southern District of New York. Thereafter, following almost a year of parrying over respective rights to discovery, this holding action was filed on April 18, 1962, Howard R. Hughes and again Hughes Tool Company being named as defendants. The motion of the defendant Howard R. Hughes to quash an order of sequestration, which had seized designated property of Mr. Hughes situate in Delaware for the purpose of

[1] This section purports to immunize a person affected by Civil Aeronautics Board orders under pertinent sections of the same act not only from federal anti-trust restraints but from "* * * all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved or required by such order."

compelling his appearance, as well as a motion to dismiss the complaint, having been denied, this Delaware action was thereafter held in abeyance without the entrance of a formal stay pending the outcome of the New York litigation.

In its answer to the New York complaint Hughes Tool Company pleaded as a defense that the transactions complained of in such action, having been conducted between two entities engaged in the aeronautics business, fell within the jurisdiction of the Civil Aeronautics Board and that by virtue of the Federal Aviation Act, 49 U.S.C. §1301 et seq, such transactions, which had been found by the Board to have been essential to the public interest, were accordingly immune from prosecution under the provisions of the anti-trust laws. On the basis of such defense, Hughes Tool Company moved to dismiss the complaint, which motion was denied, (S.D.N.Y.) 214 F. Supp. 106, a decision which was affirmed on appeal. (C.A. 2) 332 F.2d 602. Thereafter, on the failure of the defendants in such action to contest the allegations of the complaint, a default judgment was entered against Hughes Tool Company, which judgment was thereafter affirmed. The Supreme Court of the United States then granted certiorari, but later dismissed such writ as improvidently granted.

Such federal action was then remanded to the trial court which ordered the introduction of evidence on the issue of damages before a special master, a proceeding which the trial judge characterized as an inquest. The result of such proceeding was an initial award to plaintiff of $137,611,435.95. The judgment of the trial court was then affirmed.

Thereafter, the Supreme Court of the United States again granted certiorari, and reversed the judgment of

the Court of Appeals on the ground that the trial court had erred in denying the corporate defendant's motion to dismiss the complaint on the ground of its immunity from prosecution under the anti-trust laws because of the above cited provisions of the Civil Aeronautics Act, Hughes Tool Company v. TWA, 409 U.S. 363. TWA's petition for rehearing was thereafter denied, and, upon remand, the New York complaint was then dismissed.

The present action, which has lain dormant since 1963 but as to which defendants have not sought dismissal for inaction, is now sought to be brought to trial by plaintiff, which seeks to have the named defendants held liable for breaches on their part of their fiduciary duty to plaintiff and its minority stockholders. The defendants, as noted above, have again moved to dismiss the complaint on the basis of the defenses above noted.

In support of their present motion to dismiss, defendants cite the case of Chadwick v. Gill, 16 Del. Ch. 127, 141 A. 618, for the proposition that this Court will not interfere with the prosecution of a companion case in another jurisdiction until final judgment, the Court holding in the cited case that until the entry of final judgment in one court or the other, each court should be open to the prosecution of the companion case. Thus, defendants argue, plaintiff, having rested on its rights in this present equity case since 1963, by not only failing to prosecute this action but by also permitting the New York case to go to final judgment in a case in which a pendent common law claim of breach of fiduciary duty was pleaded, such state cause of action may not be relitigated in this Court.

In other words, it is contended that plaintiff should not now be permitted in this long pending litigation to assert a right to split federal statutory claims from a common

law claim, and seek to proceed to trial on a common law claim after losing the federal statutory claims.

Res judicata is a principle, which "* * * embodies a rule of public policy, that courts as well as litigants should have rest and repose from the vexatious renewal of the same lawsuit.", Epstein v. Chatham Park, Inc., 2 Storey 56, 63, 153 A.2d 180. Thus, generally speakng, a "* * * valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim.", Restatement Judgments Second § 48, and constitutes an absolute bar to a subsequent action on the same claim as to the parties and their privies on all theories which were litigated or which could have been litigated in the earlier proceeding, Cromwell v. County of Sac, 94 U.S. 351. See also Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591. The bar of res judicata also operates as a defense to any other admissible evidence which might have been offered to sustain or defeat the same claim, United States v. California and Oregon Land Company, 192 U.S. 355, and Coca Cola Company v. Pepsi-Cola Company, 6 W. W. Harr. 124, 172 A.260. The following formula is generally applied to test the applicability of the defense of res judicata: (1) is the claim in the second action the same as in the first action, (2) is the prior judgment a final personal judgment in favor of the defendant, and (3) are the parties to the second action parties or privies of parties to the first action.

In other words, a plaintiff will not be permitted, after losing a case on one theory, to pursue a different theory based on the same proof which has been rejected in the first action. Thus, in Norman Tobacco & Candy Company v. Gillette Safety Razor Company, (C.A. 5) 295 F.2d 362, a subsequent anti-trust action based on the refusal of a de-

fendant to do business impartially, a contention which had been held to have failed of proof in an earlier contract action, was found to have constituted an improper splitting of causes of action and thus barred by the principle of res judicata. See also McCann v. Whitney, 25 N.Y.S.2d 354, and Woods Exploration and Producing Company, Inc. v. Aluminum Company of America (C.A. 5) 438 F.2d 1286, in which cases it was held that a failure to assert both anti-trust claims based on both state and federal statutes in the same action constituted an improper splitting of a single cause of action.[2] On the contrary, in Household Goods' Carriers Bureau v. Terrell, (C.A. 5) 452 F.2d 152, it was held that a libel suit settled by consent decree was not res judicata as to a subsequent anti-trust action based on the same facts as the previous suit, the court noting that "* * * it is well established that in a proper case one wrongful act may be the subject of two or more separate and distinct causes of action," the court pointing out that violations of two separate and distinct primary rights had been alleged, one a personal right to be protected from potentially libelous publications and the other a business right to be free from conspiracies in restraint of trade. See also Penn Mart Realty Company v. Becker (Del. Ch.) 298 A.2d 349.

However, if the defense of res judicata is to be successfully advanced, the earlier judgment on which a movant relies must be a valid and personal judgment, and for the defense of collateral estoppel to be successfully advanced,

[2] The decision in the Woods case was based on a theory that the federal district court had pendent jurisdiction to entertain a state anti-trust claim on the authority of United Mine Workers of America v. Gibbs, 383 U.S. 715. Since the Gibbs case did not liberalize the federal view of pendent jurisdiction until 1966, it is questionable whether the district court in the present case would have exercised pendent jurisdiction under the rule in effect in 1961. Compare Hurn v. Oursler, 289 U.S. 238.

the final judgment in the prior case must have been predicated on those issues or matters sought to be litigated in the second action, Cromwell v. County of Sac, supra.

In short, a valid and final personal judgment is one which "* * * reaches and determines 'the real or substantial grounds of the action or defense as distinguished from matters of practice, procedure, jurisdiction or form, Clegg v. United States (C.A. 10) 112 F.2d 886, 887,'" Saylor v. Lindsley, (C.A. 2) 391 F.2d 965. Thus, a judgment in a prior action will not serve as bar to a second suit "* * * if the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action.", Hughes v. United States, 71 U.S. 232, 238. In the case of Equity Corporation v. Groves, 30 Del. Ch. 68, 53 A.2d 505, however, it was held that:

> "If the determination of a question is not actually necessary to sustain the prior judgment or order, it is, however, regarded as a mere collateral or incidental matter, and will not sustain a plea of res judicata."

On the other hand, in the case of Brady v. Trans World Airlines, Inc. (Del. Super.) 274 A.2d 146 it was held that a prior action did constitute a bar to a subsequent action, the Court stating:

> "It suffices if the prior judgment has determined the issues of fact raised by the pleadings essential to the maintenance of the second action, even though in form the second action differs from the first."

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In reversing the judgment below in the federal litigation here relied on as a bar to the present action, the Supreme Court of the United States held:

> "Whether or not that complaint states a cause of action under the anti trust laws is a question we do not reach. Another defense of Toolco was that those transactions were under the control and surveillance of the Civil Aeronautics Board and by virtue of the Federal Aviation Act these transactions have immunity from the anti trust laws.
>
> "It is our view that the Court of Appeals erroneously rejected that defense.", 409 U.S. 363.

Thus, the gist of the ruling by the Supreme Court was that the surveillance of the Civil Aeronautics Board over the conduct of Hughes Tool Company, in its capacity as the controlling stockholder of TWA, had rendered Hughes Tool Company immune from attack under the provisions of the anti-trust laws. And I find it significant that while the Supreme Court stated by way of dictum that such Civil Aeronautics Board approval would have undoubtedly barred a derivative stockholders suit under the anti-trust laws filed the day after the Board's primary order, no reference was made in such opinion to a stockholders suit thereafter filed based on the ground of common law principles governing the fiduciary duties of corporate officers and majority stockholders to their corporation. In short, plaintiff, in 1961, had alternative remedies, one of which was based on federal anti-trust laws, the other based on common law principles of fiduciary duty, including the wrong inherent in an alleged seizing of a corporate opportunity, and elected to proceed on its anti-trust remedies. It is its

Appendix "A"

equitable remedies which TWA now seeks to pursue in this litigation.

I conclude that the ruling of the Supreme Court in the federal action, which involved the same parties and events here in issue, was solely to the effect that the federal statutory remedies under the anti-trust laws pursued in such action by plaintiff and granted in the lower federal courts were unavailable to plaintiff solely because the intercorporate dealings allegedly forced on TWA by Hughes Tool Company had been rendered immune from attack under the anti-trust laws by reason of the provisions of the Federal Aviation Law. Such ruling does not, therefore, in my opinion, furnish a basis for the defense of res judicata in this litigation. Accordingly, defendants' motion to dismiss, insofar as it is grounded on such theory, must therefore be denied.[2] Nor does such federal holding support a plea of collateral estoppel because the issue in the present case, namely defendants' alleged commission of acts constituting breaches of their fiduciary duties toward plaintiff was likewise not determined in such litigation. Therefore, defendants' motion to dismiss, insofar as it is based on the theory of collateral estoppel, is also denied.

Finally, defendants rely on Rule 41(b) as an alternative ground for barring the present action, pointing out that the order dismissing the federal complaint in the companion litigation here relied on did not provide that such dis-

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[2] The same result is suggested by the Restatement of Judgments §65 as follows:

> "(2) Where a judgment is rendered in favor of the defendant because the plaintiff seeks a form of remedy which is not available to him, the plaintiff is not precluded from subsequently maintaining an action in which he seeks an available remedy." See also Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1, 25.

missal was without prejudice. In other words, defendants contend that under the provisions of Rule 41(b) which govern involuntary dismissals, that the dismissal of the federal litigation in New York was accordingly with prejudice and thus constituted a dismissal of such case on the so-called merits.

However, the history of such litigation, when read in conjunction with the language of Rule 41(b) and the construction placed on such rule in the case of Costello v. United States, 365 U.S. 265 (which interprets the rule as adhering to the common law when a dismissal is entered before the entry of a final personal judgment), fails to support defendants' argument. Rule 41(b) refers first to a motion to dismiss made after plaintiff "* * * has completed the presentation of his evidence" because "* * * upon the facts and the law the plaintiff has shown no right to relief."

The corporate defendant's motion in the federal court, which was ultimately upheld by the Supreme Court of the United States, was not made after plaintiff had presented all or even any of its evidence as to liability but rather on the theory that as a matter of law plaintiff had failed to establish its claim. Indeed, because defendant chose to rely solely on its defense of immunity from prosecution under the anti-trust laws on the basis of the Federal Aviation Act, the issue of liability was resolved in favor of plaintiff as a result of a default judgment, (S.D.N.Y.) 32 F.R.D. 604. Accordingly, subsequent litigation in the trial court and on appeal was thereafter concerned solely with the quantum of damages suffered by plaintiff. Finally, as I construe the Supreme Court's opinion in the companion litigation here in issue, the only question determined by such Court was that defendant was not subject to liability under the anti-trust law because of the approval by the Civil Aeronautics

Board of Hughes Tool Company's dealings with plaintiff as being in the public interest, such holding evidently being based on a policy of avoiding unnecessary clashes between a federal regulatory agency and the federal courts. Compare Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752 and Pan American World Airways, Inc. v. United States, 371 U.S. 296. In short, none of the operative facts here in issue was ever litigated and resolved in the federal case. I conclude accordingly that the further prosecution of this action on a common law theory of fiduciary duty is not barred by dismissal of a companion federal case in a situation in which federal regulatory provisions are paramount inasmuch as the power to grant immunity from the operation of the anti-trust laws operates solely to oust the federal courts of jurisdiction to enforce such laws. See Far East Conference v. United States, 342 U.S. 570, and United States Navigation Company v. Cunard S.S. Company, 284 U.S. 474.

Finally, the case of Costello v. United States, supra, holds that in a situation in which a litigant has not been required to defend on the merits, a dismissal with prejudice will not be presumed. In the federal case defendants did not defend on the merits but rather acquiesced to the entry of a default judgment. I conclude that defendants' motion to dismiss the present complaint insofar as it is predicated on Rule 41(b) must be denied.

Having failed on their motion to dismiss the complaint on the ground of res judicata, defendants also seek dismissal of the pending complaint on the ground that they are immunized from attack under state law by virtue of 49 U.S.C. §1384. In opposing such motion, plaintiff argues that no provision of the Federal Aviation Act precludes the type of redress which it seeks here and that its common law

and statutory remedies under state law have been expressly preserved by 49 U.S.C. §1506.[4]

In response, defendants ask this Court to adopt a construction of 49 U.S.C. §1384 which would provide for blanket immunity from virtually all restraints imposed by state law once approval of a transaction between persons engaged in the aeronautics field has been granted.

In Newmark v. RKO General, Inc., (S.D.N.Y.) 294 F. Supp. 358, aff'd (C.A. 2) 425 F.2d 348, however, the court held that Civil Aeronautics Board approval of a merger did not insulate directors from compliance with §16(b) of the Securities Exchange Act. Furthermore, in the case of Colorado Anti-Discrimination Commission v. Continental Airlines, Inc., 372 U.S. 714, the Supreme Court held that the area encompassed under a state anti-discrimination statute was not preempted by federal laws regulating interstate commerce in a situation in which the state regulations did not unduly burden interstate commerce and where there was no clear intent expressed by Congress that state remedies should be barred. See also Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware, (Sup. Ct. U.S.) 42 L. W. 4021, in which the Supreme Court restated its position as to the effect of federal regulations in the field of commerce as follows:

> "The principle to be derived from our decisions is that Federal regulation of a field of commerce should not be deemed preemptive of State regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakeably so ordained. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963)."

[4] "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

Applying these principles to the instant case, I find no conflict between federal aeronautics policy and the laws of Delaware, nor does the present action create an undue burden on commerce. The policy behind the Federal Aviation Act is primarily to centralize power in the public interest so as to frame rules for the safe and efficient use of the nation's aeronautics facilities, Airline Pilots Association, International v. Quesada, (C.A. 2) 276 F.2d 892, as well as to provide an agency endowed with the authority to supervise airline rates and services, Lichten v. Eastern Airlines, (C.A. 2) 189 F.2d 939.

There being no conflict, in my opinion, between federal policy as to the operation of aeronautic companies and state law having to do with corporate fiduciary duty, the present suit must, in my opinion, be allowed to proceed, Southeastern Aviation, Inc. v. Hurd, 209 Tenn. 639, 355 S.W. 2d 436, appeal dismissed, 371 U.S. 21. See also Pennsylvania Railroad Company v. Puritan Coal Mining Company, 237 U.S. 121.

In other words, the surveillance of transactions between the present corporate litigants by the Civil Aeronautics Board, according to the Supreme Court in the federal case here in issue, was carried on in the public interest rather than in the interest of corporate creditors and stockholders, the Supreme Court stating that: "* * * the control which CAB is authorized to grant or to deny under §408 involves an appraisal of the impact of that control in terms of monopoly and competition * * *", a routine area of examination for a federal regulatory agency. See Colonial Airlines, Inc. v. Janas (C.A. 2) 202 F.2d 914, Otis & Company v.

Pennsylvania R. Company (E.D. Pa.) 61 F. Supp. 905 aff'd (C.A. 3) 155 F.2d 522, and Casey v. Woodruff, 49 N.Y.S. 2d 625.

On the other hand, private grievances, such as charges of breach of fiduciary duty, are clearly beyond the jurisdiction of a federal administrative agency and do not, in my opinion, bar state action based on equitable doctrines of corporate fiduciary duty, Otis & Company v. Pennsylvania R. Company, supra. See also McFaddin Express, Inc. v. Adley Corp., (C.A. 2) 346 F.2d 424.

Next, the holding in Pan American World Airways, Inc. v. United States, supra, does not require that immunity be extended to the present suit. Here the question is whether or not the Federal Aviation Act preempts state law governing plaintiff's equitable rights, and the inquiry herein as to such rights has been carried on in light of possible conflict between such rights and the announced federal legislative purpose. Having found no conflict between plaintiff's state claims and the result reached by the federal agency here involved and its affirmed findings, defendants' motion to dismiss this action, which is based on fiduciary principles, on the theory of immunity from suit by reason of the provisions of the Federal Aviation Act, is denied.

Turning finally to the motions of the additional defendants to dismiss the counterclaims of the defendant Hughes Tool Company, which have to do with the third party defendants' alleged abuse of their rights in providing financing for plaintiff under the voting trust, I conclude that such counterclaims are clearly barred by the doctrine of res judicata and that such motions must be granted. The active parties in this litigation are substantially the same as in the New York action, and the defendant Howard R. Hughes, who has not appeared in either action, is admittedly in

privity with his wholly-owned Hughes Tool Company. The claims asserted by Hughes Tool Company against the additional defendants are the same here as were advanced in New York. The lack of merit in such claims was found in the decision of the Court of Appeals (C.A. 2) 332 F.2d 609, and such decision became final when the Supreme Court dismissed its writ of certiorari on such ruling as improvidently granted. Compare Cromwell v. County of Sac, supra.

On notice, an appropriate order in conformity with the foregoing may be submitted.

Appendix "A"

IN THE

COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

[SAME TITLE]

AND NOW, TO-WIT, this 19th day of March, 1974, on the Court's opinion of February 19, 1974 and upon defendants' application for a further stay of proceedings herein pending appeal, it is

ORDERED:

1. The motion of defendants Howard R. Hughes and Hughes Tool Company, filed May 24, 1973, to dismiss plaintiff's Complaint is denied.

2. The motion of plaintiff Trans World Airlines, Inc., dated May 1973, to dismiss Counterclaims 1 through 4, the motion of additional defendant Ernest R. Breech, dated June 15, 1973, to dismiss Counterclaims 1 and 2, the motion of additional defendant Metropolitan Life Insurance Company, dated July 3, 1973, to dismiss Counterclaims 1 through 3, the motion of additional defendant Harry C. Hagerty, dated July 3, 1973, to dismiss Counterclaims 1 and 2, the motion of additional defendant The Equitable Life Assurance Society of the United States, dated July 3, 1973, to dismiss Counterclaims 1 through 3, and the motion of additional defendant Charles C. Tillinghast, Jr., dated July 10, 1973, to dismiss Counterclaims 1 and 2, all of which said Counterclaims are set forth in the Answer and Counter-

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claims of defendant Hughes Tool Company, are granted with prejudice. The Court determines that there is no just reason for delay, and directs entry of judgment against defendant Hughes Tool Company and in favor of plaintiff Trans World Airlines, Inc. and additional defendants The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, Harry C. Hagerty, Ernest R. Breech and Charles C. Tillinghast, Jr. dismissing the First Counterclaim and the Second Counterclaim set forth in the Answer and Counterclaims of defendant Hughes Tool Company, against defendant Hughes Tool Company and in favor of plaintiff Trans World Airlines, Inc. and additional defendants Metropolitan Life Insurance Company and The Equitable Life Assurance Society of the United States dismissing the Third Counterclaim asserted in the Answer and Counterclaims of defendant Hughes Tool Company, against defendant Hughes Tool Company and in favor of Trans World Airlines, Inc. dismissing the Fourth Counterclaim asserted in the Answer and Counterclaims of defendant Hughes Tool Company.

3. The separate motion of defendant Howard R. Hughes to dismiss the Complaint as to him, dated December 3, 1962, is denied, and said defendant is ordered to serve and file his Answer to the Complaint within thirty (30) days of entry hereof.

4. The provision of the Court's Order of June 6, 1973 staying all discovery herein until further order is vacated.

5. All proceedings herein, including implementation of Paragraph 3 hereof and discovery by any party hereto, are stayed pending appeal from this Order by defendants to the Supreme Court of the State of Delaware provided such

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appeal is perfected within twenty (20) days of entry hereof.

/s/ William Marvel
Vice Chancellor

Approved as to Form:

/s/ Louis J. Finger
Attorney for Plaintiff

/s/ George Tyler Coulson
Attorney for Defendants
Howard R. Hughes and
Hughes Tool Company

/s/ William Prickett
Attorney for Additional Defendants
Metropolitan Life Insurance Company,
The Equitable Life Assurance Society
of the United States and
Harry C. Hagerty

/s/ Leroy A. Brill
Attorney for Additional Defendant
Ernest R. Breech

/s/ Carl Schnee
Attorney for Additional Defendant
Charles C. Tillinghast, Jr.

/s/ Richard F. Corroon
Attorney for Additional Defendant
Irving Trust Company,
appearing specially

APPENDIX "B"

In the

Supreme Court of the State of Delaware

No. 90, 1974

Howard R. Hughes and Hughes Tool Company,

Defendants Below,
Appellants,

v.

Trans World Airlines, Inc.,

Plaintiff Below,
Appellee,

and

The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, Irving Trust Company, Harry C. Hagerty, Ernest R. Breech and Charles C. Tillinghast, Jr.,

Certain Additional
Defendants Below,
Appellees.

(Argued September 25, 1974 Decided February 26, 1975.)

Before:

Duffy, *Justice*, McNeilly, *Justice*, and
Bifferato, *Judge*.

Upon appeal from the Court of Chancery. Affirmed.

Appendix "B"

George Tyler Coulson, of Morris, Nichols, Arsht & Tunnell, Wilmington, and Chester C. Davis and Maxwell E. Cox, of Davis & Cox, New York City, for defendants below, appellants.

Louis J. Finger, of Richards, Layton & Finger, Wilmington, and Dudley B. Tenney, Paul W. Williams, Marshall Cox and Michael P. Tierney, of Cahill Gordon & Reindel, New York City, for plaintiff below, appellee.

Leroy A. Brill, of Bayard, Brill & Handelman, Wilmington, and Marvin Schwartz, of Sullivan & Cromwell, New York City, for Ernest R. Breech, additional defendant below, appellee.

William Prickett, of Prickett, Ward, Burt & Sanders, Wilmington, and John R. Hupper and Andrew P. Tashman, of Cravath, Swaine & Moore, New York City, for certain other additional defendants below, appellees.

DUFFY, *Justice:*

This appeal brings up for review an order of the Court of Chancery denying a motion to dismiss the complaint and granting motions to dismiss certain counterclaims.

I

The case involves a contest, long in litigation, between Howard R. Hughes and Hughes Tool Company (Toolco) (defendants), on the one side, and Trans World Airlines, Inc., (plaintiff), on the other.[1] The pertinent facts are stated in the opinion of the Vice Chancellor, 317 A.2d 114

[1] Privity between Hughes and Toolco is conceded by each side and for present purposes their positions are indistinguishable.

Appendix "B"

(1974), and we will restate them only to the extent necessary as we consider defendants' argument for reversal.[2]

II

In *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, supra (1973 opinion), the Supreme Court of the United States concluded that TWA's complaint against Toolco for alleged anti-trust violations and damages should be dismissed and, in accordance with its mandate, the United States District Court for the Southern District of New York entered a judgment of dismissal.

Briefly, the complaint in this action is based on alleged violations of fiduciary duties to the corporation and its minority stockholders by corporate officers and the majority stockholder. For present purposes, it appears that the facts alleged are substantially the same as those pleaded in the anti-trust action. Defendants argue that the Federal judgment bars prosecution of this case. They say that judgment was valid, final, personal and on the merits of the same claims asserted here (and which could have been asserted there). In so contending, they invoke the familiar doctrine of *res judicata.*

Res judicata embodies a rule of public policy that courts as well as litigants should have rest and repose from vexatious renewal of the same lawsuit. *Epstein* v. *Chatham*

[2] See also the many opinions in the Federal Courts; thus: *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 93 S. Ct. 647 (1973); rehearing den. 410 U.S. 975, 93 S. Ct. 1435 (1973); cert. granted 405 U.S. 915, 92 S. Ct. 960 (1972); 2 Cir., 449 F.2d 51 (1971); S.D.N.Y., 359 F. Supp. 783 (1973); S.D.N.Y., 312 F. Supp. 478 (1970); S.D.N.Y., 308 F. Supp. 679 (1969). Earlier opinions are reported at 380 U.S. 248, 85 S. Ct. 934 (1965); 379 U.S. 912, 85 S. Ct. 261 (1964); 2 Cir., 332 F.2d 602 (1964); S.D.N.Y., 214 F. Supp. 106 (1963); see also: Del. Supr., 185 A.2d 886 (1962).

Appendix "B"

Park, Inc., Del. Super., 153 A.2d 180 (1959). It precludes a second attempt to litigate the same "cause of action" and, under certain circumstances, matters which might have been litigated in the prior suit. *Ezzos* v. *Ackerman*, Del. Supr., 234 A.2d 444 (1967). Clearly, a valid, final and personal judgment entered on the merits of a controversy puts to rest all matters litigated. *Restatement of Judgments* § 48 (1942).

Central in the rule is the rationale that a person is entitled to an opportunity to once litigate a claim on its merits, and once only. Renewal of the same claim after disposition on its merits is not permissible, whatever the theory. But basic to the principle of rest and repose is the notion that one is entitled to his day in court on the merits of a claim. This means that a judgment for a defendant, which is valid and final but not "on the merits," is conclusive only as to what is actually decided. *Restatement*, supra, § 49.[3]

These principles are well known and, indeed, there is little, if any, dispute about them as long as they remain in abstraction. But our duty is to test them against the submissions in the dispute, and now we do so.

As we have noted, the Toolco (and Hughes)-TWA litigation has been on-going for years but, beyond doubt in deciding this case, the key opinion is the 1973 decision by the United States Supreme Court. That was dispositive of all litigation in the Federal Courts and it mooted all that had gone before which was inconsistent with the result. The default by Toolco and the entry of a money judgment were among the casualties of the Supreme Court mandate.

[3] We do not consider such matters as jurisdiction and capacity. See Comment *a* to § 49.

Appendix "B"

The Supreme Court opinion considers many matters but our reading persuades us of two things which are significant for present purposes: first, the Court considered the controversy only and entirely in the context of the Federal anti-trust statutes; and, second, it did not consider whether the complaint stated a cause of action under those statutes.

As to the first of these, an extended review of the opinion by Justice Douglas is not needed to document the conclusion that the Court disposed of the litigation entirely on the basis of anti-trust principles, statutory and decisional.

"It is our view," he wrote, "that the Court of Appeals erroneously rejected" Toolco's defense that the transactions attacked in the complaint "were under the control and surveillance of the Civil Aeronautics Board and by virtue of the Federal Aviation Act of 1958 these transactions have immunity from the anti-trust laws." He discussed the Federal Aviation Act, the duty and authority of the Civil Aeronautics Board, the relationship of Toolco and TWA and the Board's duty to supervise it, and specific transactions approved by the Board. Following the Court's earlier decision in *Pan American World Airways Inc.* v. *United States*, 371 U.S. 296, 83 S. Ct. 476 (1963), he found that CAB jurisdiction "pre-empts the anti-trust field." In short, Justice Douglas found that the way in which control of an air carrier is exercised is under CAB surveillance, "not in the hands of those who can invoke the sanctions of the anti-trust laws."

And then, as to the Federal complaint on which the case reached the Supreme Court, Justice Douglas wrote: "Whether or not that complaint states a cause of action under the anti-trust laws is a question we do not reach." Since the Court did not reach even the allegations of the

complaint, it obviously did not consider the merits of the proof offered by TWA in support thereof.[4]

Given the basis on which the Supreme Court ordered termination of the litigation in the Federal Courts, we cannot say (in either law or justice) that the merits of the controversy were reached. The merits *were* reached in the District Court where a default had been entered, evidence had been received and a money judgment entered (and affirmed by the Circuit Court). But all of that was made irrelevant by what the Supreme Court decided. Certainly it made no factual adjudication. And it disposed of the litigation, not on the basis of default or evidence or money judgment, but on the transactional immunity conferred by the CAB under the Federal Aviation Act to a complaint founded on a Federal anti-trust statute.

In this context we conclude that the decision by the United States Supreme Court was not "on the merits" of the same claims alleged here to be violations of Delaware fiduciary law. Thus a significant requirement for a bar by *res judicata* is missing. *Epstein* v. *Chatham Park, Inc.*, supra; *Restatement*, supra, § 49, and that defense does not stop the litigation.

III

There are other arguments to consider and weigh, and we now turn to defendants' contention that, under Rule 41(b) of the Rules of Civil Procedure, the dismissal by the District Court in New York was an adjudication on the merits.

---

[4] The Court did discuss five transactions which were a basis of damages awarded by the District Court but it did so only for the purpose of determining whether such transactions were "neutralized" by CAB approval.

Chancery Rule 41(b), like the Federal Rule, provides that

> "... [u]nless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

To the extent defendants argue that the Supreme Court opinion directing dismissal was an adjudication on the merits, for purposes of this case, the contention is without merit for reasons already stated. But it was the District Court which entered the dismissal order and the argument by defendants obliges us to examine what was done in and by that Court.

Judge Metzner filed an opinion with the order of dismissal so we have the benefit of his view of what was done, and that is particularly significant since Rule 41(b) attaches consequences to a dismissal "[u]nless the Court ... otherwise specifies."

First, it is clear that the dismissal was upon the merits "as far as the federal claims are concerned." But, in our view, a fair reading of Judge Metzner's opinion does not lead to the same conclusion about the non-federal claims. On the contrary, we are satisfied that he believed such claims are *not* barred by his order. Thus, he wrote that "it does not follow that such a dismissal [in the Federal Court] would be a bar to the nonfederal claims" and then discussed *Calderone Enterprizes Corp.* v. *United Artists Theater Circuit, Inc.*, 2d Cir., 454 F.2d 1292 (1971), cert. den. 406 U.S. 930 (1972). In that case the Second Circuit stated that since "federally-based claims were dismissed prior to

trial, . . . pendent state claims must also be dismissed and the plaintiff relegated to the state courts for relief." Judge Metzner particularly noted that the dismissal in *Calderone* had not been made without prejudice, and then he said this:

> ". . . I gather from this that such a safeguard is not necessary to protect whatever rights plaintiff may have in this regard. It might also be argued that, standing alone, the court is without jurisdiction of the state claims and thus the dismissal is for lack of subject matter jurisdiction which is not on the merits under Rule 41(b)."

The Court was under a mandate from the United States Supreme Court "to dismiss the complaint" and its reluctance to amend that directive was explicit, while observing that there is doubt as to whether an amendment "is necessary to protect the interests of the parties."

Under Rule 41(b) a prior dismissal operates as an adjudication upon the merits unless the court in its dismissal order otherwise specifies. We are satisfied that the District Court intended that its order would not settle non-federal claims and, to that significant extent, it otherwise specified. Thus, neither the order nor the Rule, singly or in combination, operates as an adjudication to bar assertion of the claims here.

IV

We turn now to defendants' argument that the claims alleged in the complaint could have been asserted in the Federal action under the theory now advanced. In brief, they say that the Federal Court would have taken pendent jurisdiction of the claims based upon violation of fiduciary duties and the right to litigate such claims in the state forum terminated with the judgment in that Court.

Acceptance of pendent jurisdiction by a Federal Court is a matter of judicial discretion. While such jurisdiction has been taken by those Courts for many years, the key opinion defining it was written by Justice Brennan after the TWA-Toolco-Hughes litigation had been on-going for some five years. In *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 86 S. Ct. 1130 (1966), the Court stated:

> ". . . Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *,' . . . and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. . . . The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.
>
> That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, ... Needless decisions of state law

should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." (Citations and footnotes omitted.)

We are asked to hold now that if the District Court had been requested in 1961 to exercise its discretion and take jurisdiction of the non-federal claims based upon violation of Delaware fiduciary duties, it would have done so; and we are further asked to hold now that had it done so the Federal Courts would in some way or other have dealt with the claims.

It is true that the District Court was asked to and did accept jurisdiction of TWA's (non-federal) claim for tortious interference with its business, but in divining what might have been a dozen years ago we cannot ignore what has taken place in the law since then.

In *Gibbs* the Supreme Court "completely reformulat[ed] the doctrine; [and] greatly expanded the permissible exercise of pendent jurisdiction" in the Federal Courts. *UMW v. Gibbs and Pendent Jurisdiction*, 81 Harv. L. Rev. 657 (1968). But even with that expansion, *Gibbs* makes clear that if Federal claims, which are substantial in a jurisdictional sense, are dismissed before trial, "the state claims should be dismissed as well." While in one sense the TWA claims in the Federal Court were not dismissed before trial, the result of the Supreme Court opinion (which in no way deals with the merits of the claims) surely gives that effect. To state the point somewhat differently, if an action for alleged violation of an anti-trust statute is now filed

in a Federal Court and if the transactions in question have been approved by the CAB, there can be no doubt that the complaint will be dismissed and, under *Gibbs*, the Court will *not* assume jurisdiction of pendent (state) claims.[5]

---

[5] Defendants rely upon *Rosado* v. *Wyman*, 397 U.S. 397, 90 S. Ct. 1207 (1970) and *Hagans* v. *Lavine*, —— U.S. ——, 94 S. Ct. 1372 (1974), in support of a contrary proposition. In both of those cases the pendent (statutory) claim was *Federal* (appended to Federal constitutional claims), not *state*, and the distinction is significant in the process of conjecturing whether or not a Federal Court will entertain a pendent claim. As Justice Douglas said in his concurring opinion in *Rosado:*

> "The main distinction between this case and *Gibbs* is that the pendent claim here was one of federal rather than state law. And it is clear from the opinion in *Gibbs* that the factor of federal-state comity is highly relevant in deciding whether or not the exercise of pendent jurisdiction is proper. Thus the Court stated: 'There may, on the other hand, be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong.' *Id.*, at 727, 86 S.Ct., at 1139. Since the claim involved here is one of federal law, the reasons for the exercise of pendent jurisdiction are especially weighty, and exceptional circumstances should be required to prevent the exercise."

Hagans discussed state claims but only in the context of attachment to Federal constitutional claims, thereby invoking the preference for first deciding non-constitutional issues. As the *Hagans* Court said:

> ". . . [T]he rationale of *Gibbs* centers upon considerations of comity and the desirability of having a reliable and final determination of the state claim by state courts having more familiarity with the controlling principles and the authority to render a final judgment. These considerations favoring state adjudication are wholly irrelevant where the pendent claim is *federal* but is itself beyond the jurisdiction of the District Court for failure to satisfy the amount in controversy. In such cases, the federal court's rendition of federal law will be at least as sure-footed and lasting as any judgment from the state courts."

It is *Gibbs* which deals explicitly with a pendent state claim, and we follow its rule.

In short, we have the benefit of hindsight in deciding whether the TWA claims alleged for violation of Delaware fiduciary duties should be regarded as ones over which the Federal Court would have assumed jurisdiction (as it did with the claim for tortious interference), and we cannot ignore what the United States Supreme Court decided both in this case and in *Gibbs*. Admittedly, the issue has its uncertain aspects because the Court did take on the claim for tortious interference. But, in our view, it would elevate speculation over reality to now dispose of this case by theorizing about what might have been (had the State claims been raised pendently in 1961).

And if there were any doubt about what ruling should be made the commands of justice require us to give TWA its day in court on the claims.

It should also be noted that the Chancery complaint was filed in 1962 and defendants did nothing to either bring it on for disposition or to ask the Federal Court to accept jurisdiction of the claims. On the contrary, in 1963 defendants joined TWA in persuading the Vice Chancellor to let the case (and, necessarily, the claims made herein) rest while awaiting determination of the Federal case. The Court did so and defendants acquiesced therein for ten or eleven years.

In sum, we decline to deny TWA all opportunity to litigate its claims on the theory that the Federal Court would have taken jurisdiction of them.

V

Next, we consider defendants' argument that the CAB orders, which the Supreme Court held were a defense to the Federal action, likewise bar this action.

Section 414 of the Federal Aviation Act, 49 *U.S.C.* § 1384, provides that any person affected by an order under § 408 is relieved

> ". . . from the operations of the anti-trust laws . . . and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

The Vice Chancellor found that neither the purpose of the Act nor its case history bars a state action based on breach of a fiduciary duty.

Essentially, defendants argue that § 414 means what it says and that, once CAB approval is given, *all* other restraints or prohibitions are barred.

Locating state law in areas subject to Federal regulatory jurisdiction is difficult, but that does not mean it has vanished. Certainly state power (and responsibility) does not disappear merely because there is Federal regulation in an area of commerce. The guiding principle was restated by the Supreme Court in *Merrill Lynch Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117, 94 S. Ct. 383 (1973), when it considered the extent to which authority delegated under a Federal regulatory statute (Securities Exchange Act of 1934 § 6, 15 *U.S.C.* § 78(f) preempts state (labor) law; the Court quoted from an earlier opinion by Justice Brennan, thus:

> "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other

conclusion or that the Congress has unmistakably so ordained."

As the Vice Chancellor stated, the purpose of the Federal Aviation Act is to centralize power in the public interest so that rules may be made for the "safe and efficient use of the nation's air space." *Air Line Pilots Association, International* v. *Quesada,* 2 Cir., 276 F.2d 892 (1960). Section 414 must be read in light of that purpose and the specific preservations of common law (and statutory) remedies by § 1106 of the Act, 49 *U.S.C.* § 1506, which provides:

> "Nothing contained in this Chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Chapter are in addition to such remedies."

We deal here with an intra-corporate conflict. The claims are large, the events are dated and complex; but in essence, the contest simply invokes standards of conduct applicable to corporate fiduciaries and litigated over the years in Delaware Courts. Nothing has been called to our attention which persuades us that the Congress intended to preempt State power to regulate such conduct (as part of our "housekeeping" function, if nothing more) and vest it in the CAB. What remedies would the Board provide? What judgments would it render? What protection would it accord to minority stockholders, and by what process?

The short of it is that the CAB's basic mission and competency is, as Chief Justice Burger emphasized in his dissent in *Hughes Tool,* supra, the regulation of entry into and competition within the air transportation industry. There has been here no showing that any general Federal purpose is vested in the CAB to preempt state regulation

of the intra-corporate affairs of those subject to CAB jurisdiction for airline regulation purposes. See *Newmark* v. *RKO General Inc.,* S.D.N.Y., 294 F. Supp. 358, aff'd 2 Cir., 425 F.2d 348 (1970); and *Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.,* 372 U.S. 714, 83 S. Ct. 1022 (1963); and compare *Colonial Airlines* v. *Janas,* 2 Cir., 202 F.2d 914 (1953), in which the Court noted that it is "clear from . . . the Act," 49 *U.S.C.* § 676, that the CAB had not made any determination of state law liability running to a corporation from its officers on charges of defalcations.

We must, and of course do, give deference to all that the CAB approves within the jurisdiction assigned it by the Congress. And we specifically refrain from any comment as to the significance of CAB approval of any specific transaction upon liability of defendants. As TWA concedes in its brief, whether any particular issues were finally determined in the Federal action is not at issue in this appeal. We are concerned here only with defendants' contention that a blanket immunity flows from § 414, no matter the circumstances. We decide that TWA may proceed with the litigation.

VI

Finally, we take up the counterclaims defendants filed against The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, Irving Trust Company, Harry C. Hagerty, Ernest R. Breech and Charles Tillinghast, Jr. (additional defendants) seeking injunctive and other relief. The Vice Chancellor ordered dismissal of the counterclaims on the ground that they are barred by the doctrine of *res judicata.*

Appendix "B"

As we understand defendants' argument, they say that if the Vice Chancellor's order stands and the Federal order is not a bar to TWA's action, this Court should require an even-handed result; that is, "Both should be dismissed or neither."

In our opinion the Vice Chancellor was right in dismissing the counterclaims. Defendants' argument assumes that the rationale for dismissals by the Federal Court of the complaint and the counterclaims was the same, and that is not so. We have already discussed at some length the basis for dismissal of the complaint as ordered by the United States Supreme Court. The counterclaims were dismissed, not on the absence of a statutory remedy or CAB approval, but specifically on their merits and "with prejudice" because of Toolco's "willful and deliberate disobedience of and failure and refusal to comply with" certain discovery orders of the District Court.[6] The Court of Appeals affirmed, 2 Cir., 332 F.2d 602 (1964), and its decision became final when the United States Supreme Court dismissed its writ of certiorari as improvidently granted. 380 U.S. 249, 85 S. Ct. 934 (1965).

* * * * *

Affirmed.

[6] As to the first five Federal counterclaims; the sixth counterclaim was disposed of on the merits, TWA's motion for summary judgment being granted by the District Court. These six Federal counterclaims are identical in scope to the four counterclaims asserted in this Chancery action.

Appendix "B"

SUPREME COURT OF DELAWARE

P.O. Box 470

T. E. Townsend, Jr.
Clerk

April 1, 1975

To:

Allen M. Terrell, Jr., Esquire
Leroy A. Brill, Esquire
Carl Schnee, Esquire
Richard F. Corroon, Esquire
S. Tyler Coulson, Esquire
William Prickett, Esquire

Re: Hughes, et al. v. TWA, et al.
No. 90, 1974

Dear Sirs:

By direction of the Court, Defendants' motion for reargument is denied.

Yours truly,
T. E. Townsend, Jr.

Appendix "B"

MANDATE

THE SUPREME COURT OF THE STATE OF DELAWARE

To the Honorable the Judges of the Court of Chancery of the State of Delaware in and for New Castle County:

Greeting:

WHEREAS, before you or some of you in a cause entitled as follows:

C. A. 1607

HOWARD R. HUGHES, et al.

vs.

TRANSWORLD AIRLINES, INC.

a certain judgment or order was entered on the 19th day of March 1974, to which reference is hereby made; and

WHEREAS, by appropriate proceedings the said cause was duly appealed to this Court, and after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on February 27, 1975, a certified copy of which is attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the said judgment or order be and it is hereby affirmed.

WITNESS the Honorable D. L. Herrmann our Chief Justice, at Dover, the First day of January, A. D. 1975.

Issued April 1 1975

T. E. TOWNSEND, JR.
Clerk of the Supreme Court.

APPENDIX "C"

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

39494

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

Appearances

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Attorneys for Plaintiff
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DUDLEY B. TENNEY
PAUL W. WILLIAMS
MARSHALL COX
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CHESTER C. DAVIS
Attorney for Defendants
One State Street Plaza
New York, N. Y. 10004

Appendix "C"

METZNER, *D. J.*:

The plaintiff seeks to enter a judgment in this action on remand from the Supreme Court which would have the effect of amending the mandate of the court.

The litigation has lasted for twelve years and is fully discussed in many reported opinions. Insofar as the instant problem is concerned, the pertinent facts may be briefly stated.

On February 7, 1963, this court denied the defendants' motion to dismiss the complaint. 214 F. Supp. 106. The order was affirmed by the Court of Appeals on June 2, 1964. 332 F.2d 602. The Supreme Court originally granted certiorari, 379 U.S. 912, but after argument dismissed the writ as improvidently granted. 380 U.S. 248 (1965).

The inquest ordered on defendant Hughes' default then proceeded and on December 23, 1969 this court filed its opinion confirming the report of the special master awarding damages amounting to $137,611,435.95. 308 F. Supp. 679. Judgment was thereafter entered, and on September 1, 1971 the Court of Appeals affirmed the judgment. 440 F.2d 51. On January 10, 1973 the Supreme Court reversed the judgment holding the transactions in question to be immune from the antitrust laws, that primary jurisdiction lies in the Civil Aeronautics Board, and that the complaint in this action be dismissed. 41 U.S.L. Week 4131 (January 10, 1973).

The mandate issued from the Supreme Court directed that the judgment of the Court of Appeals be reversed and the cause "remanded to the United States Court of Appeals for the Second Circuit for further proceedings in conformity with the opinion of this Court." The Second Circuit then issued its mandate which directed that the "action

Appendix "C"

is remanded to said district court for further proceedings in conformity with the opinion of the Supreme Court of the United States . . . ."

The opinion of the Supreme Court stated explicitly that the complaint must be dismissed. Plaintiff desires this court to enter a judgment dismissing the complaint without prejudice to its nonfederal claims of breach of fiduciary duty. The complaint in this court consisted of two claims for violation of the Federal antitrust laws and a pendent state claim for tortious interference with the business of TWA based on the same facts as set forth in the first and second claims. The latter is not the state claim that TWA is interested in.

An action seeking relief for breach of fiduciary duty was instituted in the Chancery Court of Delaware in 1962 and has been held in abeyance pending determination of TWA's claim of violation of the antitrust laws. In other words, having failed to obtain treble damages, TWA now seeks to be free to pursue its remedy to recover single damages on the same facts.

TWA is of the opinion that a judgment dismissing the complaint in this court might be held to be a dismissal on the merits, pursuant to Fed. R. Civ. P. 41(b), and thus a bar to the continued prosecution of the state court action. It urges that if it had asserted the state court claim as pendent to the antitrust claims, the dismissal of the latter would have been without prejudice to the pendent claim. *See United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 726 (1966); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *O'Neill* v. *Maytag*, 339 F.2. 764, 766 n.3 (2d Cir. 1964). Finally, it argues that the Court was only concerned with the question of juris-

diction of the asserted federal claims and never intended that any state claims be foreclosed. At this point I should indicate that while the decisions speak in terms of "jurisdiction," they properly should cast the issue in terms of "failure to state a claim." *Danna* v. *Air France,* 463 F.2d 407, 408 n.4 (2d Cir. 1972).

It is clear that under Rule 41(b) a dismissal of the complaint, certainly as far as the federal claims are concerned, would be upon the merits. However, it does not follow that such a dismissal would be a bar to the nonfederal claims. In the *Calderone* case, *supra,* the complaint alleged federal claims and pendent state claims. The federal claims were dismissed on motion for failure to state a claim. The court pointed out that this action did not leave the plaintiff without remedy:

> "Since federally-based claims were properly dismissed prior to trial, however, the pendent state claims must also be dismissed and the plaintiff relegated to the state courts for relief." 454 F.2d at 1297.

Interestingly enough, the order entered in that case did not dismiss the pendent claims without prejudice. I gather from this that such a safeguard is not necessary to protect whatever rights plaintiff may have in this regard. It might also be argued that, standing alone, the court is without jurisdiction of the state claims and thus the dismissal is for lack of subject matter jurisdiction which is not on the merits under Rule 41(b).

Finally, a reading of the Supreme Court opinion clearly indicates the issue that was before the Court if a claim is ever made in the state court that the judgment to be entered is a bar to that action.

This court is obviously reluctant to amend the mandate of the Supreme Court, especially when there is doubt that such action is necessary to protect the interests of the parties. Furthermore, the authority relied on by plaintiff to justify its request, In re Sanford Fork and Tool Company, 160 U.S. 247, 255-256, 16 S.Ct. 291, 40 L.Ed. 414 (1895), is not in point. While the Court there indicates that the lower court may consider and decide any matters left open by the mandate, it expressly states that the court cannot vary it, "even for apparent error, upon any matter decided on appeal; . . ." The mandate in this case clearly calls for a dismissal of the complaint and this court must enter such a judgment.

The Clerk is directed to enter a judgment dismissing the complaint with costs.

So ordered.

/s/ CHARLES M. METZNER
U. S. D. J.

Dated: New York, N. Y.
May 23, 1973

APPENDIX "D"

Statutory Provisions Involved

* * * * *

UNITED STATES CODE, TITLE 28:

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.

UNITED STATES CODE, TITLE 49

§ 1378. [Section 408, Federal Aviation Act] *Consolidation, merger, and acquisition of control.*

(a) *Prohibited acts.* It shall be unlawful unless approved by order of the Board as provided in this section—

* * * * *

Appendix "D"

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

* * * * *

(b) *Application to Board; hearing; approval; disposal without hearing.* Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe:

* * * * *

(e) *Investigation of violations.* The Board is empowered, upon complaint or upon its own initiative, to investigate and, after notice and hearing, to determine whether any person is violating any provision of subsection (a) of this section. If the Board finds after such hearing that such person is violating any provision of such subsection, it shall by order require such person to take such action, consistent with the provisions of this chapter, as may be necessary, in

the opinion of the Board, to prevent further violation of such provision.

* * * * *

§ 1384. [Section 414, Federal Aviation Act] *Legal restraints.* Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 12 or Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

RULES OF CIVIL PROCEDURE

Rule 41: Dismissal of Actions

* * * * *

(b) *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in

its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

* * * * *

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1653

SUMMA CORPORATION and HOWARD R. HUGHES,

Petitioners,

v.

TRANS WORLD AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF FOR RESPONDENT TRANS WORLD AIRLINES, INC. IN OPPOSITION

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IN THE

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October Term, 1974

No. 74-1653

SUMMA CORPORATION and HOWARD R. HUGHES,

Petitioners,

v.

TRANS WORLD AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF FOR RESPONDENT TRANS WORLD AIRLINES, INC. IN OPPOSITION

The petition herein seeks review of a decision by the Supreme Court of the State of Delaware entered on February 26, 1975 [App. 21a *et seq.**] on which rehearing was denied on April 1, 1975 [App. 37a] and which is reported at 336 A.2d 572. The decision of the Supreme Court of Delaware affirmed the opinion [App. 1a *et seq.*], reported at 317 A.2d 114, and order [App. 18a-20a] of the Court of Chancery of the State of Delaware which (1) denied petitioners' motion to dismiss the complaint on

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* Citations to "App. ——a" are to pages of the Appendix to the petition; references to "Del.App. A——" are to Appellants' Appendix in the Supreme Court of Delaware; references to "TWA App. A——" are to TWA's Appendix in the Supreme Court of Delaware.

grounds of *res judicata* and of immunity arising from orders of the Civil Aeronautics Board ("CAB"), and (2) granted the several motions of respondent Trans World Airlines, Inc. ("TWA") and certain third party defendants to dismiss the counterclaims of Hughes Tool Company* on the ground that identical counterclaims had been dismissed with express prejudice in the prior federal action.

No review is sought as to so much of the decision of the Delaware Supreme Court as affirmed denial of petitioners' motion to dismiss grounded upon asserted CAB immunity [App. 32a-35a, 336 A.2d at 578-79] and dismissal of Toolco's counterclaims [App. 35a-36a, 336 A.2d at 579-80].

Question Presented

When a federal court judgment has dismissed a private antitrust suit on the ground that relief under the antitrust laws is unavailable to plaintiff since the transactions complained of occurred in the course of exercise by defendant of a control over plaintiff authorized by the CAB, do judicial doctrines of finality compel a state court to deny all relief under common law principles governing self-dealing, misappropriation of corporate opportunities and breaches of fiduciary duty arising from the same transactions?

Counter-Statement of the Case

This action was instituted on April 18, 1962 for an accounting by Hughes and Toolco for breach of their

* Hughes Tool Company changed its name to Summa Corporation in late 1972, but herein, as below, we will refer to it as "Toolco."

fiduciary duties to TWA, and to TWA's minority shareholders, during a period when petitioners were in control of TWA. Following a decision by the Delaware Supreme Court upholding sequestration of Hughes's stock in Toolco, *Hughes* v. *Trans World Airlines, Inc.*, 40 Del. Ch. 552, 185 A.2d 886 (Sup. Ct. 1962), and the Court of Chancery's denial of Hughes's motion to dismiss for failure to state a claim, from which no appeal was taken, the Delaware action was informally stayed, *at petitioners' urging* [TWA App. A4-A5], because it then seemed probable that TWA's antitrust claims would be fully adjudicated and all its injuries compensated in the federal action. Indeed, following this Court's 1965 dismissal of certiorari with respect to the interlocutory default judgment against Toolco in the federal action, 380 U.S. 248, damage hearings before Special Master Herbert Brownell resulted in a finding—confirmed by the federal district court, 308 F.Supp. 679 (1969), and the Court of Appeals for the Second Circuit, 449 F.2d 51 (1971)—that TWA had suffered substantial injuries in an amount in excess of $45 million actual damages. The correctness of this finding was presented to but not decided by this Court when it directed that the federal action be dismissed in 1973. 409 U.S. 363, 389.

Petitioners suggest here, as they explicitly asserted below, that TWA has had its day in court in the federal action and therefore the Delaware courts cannot permit TWA to seek redress for its substantial injuries under its common law claims, which have been pending in the Delaware courts since 1962. But TWA has not had its day in court, and if petitioners prevail here, the only remaining forum where TWA may seek such relief—indeed, the only forum ever in which Hughes can be called to account

personally for his stewardship of TWA*—will be denied to it.

In the federal action, Toolco moved to dismiss the complaint on the ground (also asserted in its answer) that CAB orders approving its acquisition of control of TWA were a bar to the antitrust action. That motion to dismiss was held in abeyance at Toolco's request for well over a year, and was not brought on for argument until February 6, 1963. At that time, relying upon the view then generally accepted as to the limits of such CAB approval, the district court denied the motion. 214 F.Supp. 106. Subsequently, Toolco defaulted, and on appeal from the resulting interlocutory judgment the decision of the district court was unanimously affirmed by the Court of Appeals. 332 F.2d 602 (1964). This Court first granted certiorari, 379 U.S. 912 (1964), but after full briefing and argument (which included a brief *amicus* presented by the CAB supporting TWA's position) it dismissed certiorari as having been improvidently granted. 380 U.S. 248 (1965).

Eight years later, however, this Court held, on appeal from the judgment eventually entered in TWA's favor, that the defense based on CAB orders should have been upheld after all. 409 U.S. 363, 366 (1973). The motion to dismiss made at the outset of the litigation should have been granted. Accordingly, the Court directed that, following remand, the complaint should be dismissed (*id.* at 389). The Court expressly found it unnecessary to reach any of

* Hughes was never personally subjected to any claim whatever in the federal courts; he successfully avoided service of process throughout. Whatever rights to bar TWA's Delaware claims Toolco may be able to claim, Hughes is not entitled to assert the prior federal court judgment as a bar to TWA's Delaware law claims against him. *Kern* v. *Hettinger*, 303 F.2d 333, 340-41 (2d Cir. 1962).

the other issues which had been presented (*ibid.*), having stated at the outset of the opinion that "[w]hether or not [TWA's federal] complaint states a cause of action under the antitrust laws is a question we do not reach." (*id.* at 366).

Following remand, a judgment was duly entered by the district court in compliance with this Court's mandate, dismissing the complaint. TWA was concerned that the dismissal might erroneously be treated as an adjudication on the merits of its charges against its former controlling stockholder, in spite of the fact that this Court had plainly not reached those merits. It accordingly requested a specific notation that the dismissal was without prejudice to the pending Delaware action. Hon. Charles M. Metzner, the United States District Judge who had presided over the federal action since 1961, refused to make the notation in the judgment of dismissal. He was at pains to explain, however, that he considered such a notation to be unnecessary to safeguard plaintiff's rights. Judge Metzner's opinion—reported at 359 F.Supp. 783 [App. 39a *et seq.*]—is a clear specification of what the dismissal was intended to adjudicate, a specification entirely inconsistent with petitioners' argument. The federal claims were finally disposed of, since there was a final determination that petitioners are protected from liability under the antitrust laws by CAB orders. TWA's Delaware law claims of self-dealing, mismanagement and breach of fiduciary duty were not adjudicated because they had not been reached and tried. So the Delaware courts have held.

It is fortunate in the interest of justice to TWA and its more than 35,000 stockholders that, promptly after Toolco asserted this affirmative defense of CAB approval, TWA had instituted the present action to preserve its common

law rights, before further delays could put them in jeopardy under principles of laches or limitation.*

ARGUMENT

The Delaware courts determined, after applying to the circumstances of this case the pertinent principles of *res judicata,* concerning which, as the Delaware Supreme Court noted, "there is little, if any, dispute" [App. 24a, 336 A.2d at 574], that TWA is entitled to its day in court on its common law claims against petitioners. The petition characterizes this decision as a "startling departure from, and * * * in direct conflict with, established principles" (Pet., p. 10). Nothing could be further from the truth. The right of each litigant to his day in court, which the decisions of the Delaware courts vindicate, is the first principle of our coordinate legal system in which the state and federal courts are not antagonists, but rather partners in protecting the rights of citizens. *Plaquemines Tropical Fruit Co.* v. *Henderson,* 170 U.S. 511 (1898); 1 J. MOORE, FEDERAL PRACTICE ¶ 0.6[3] (2d ed. 1974). It is a principle which requires the special protection of the state courts in matters where the federal courts are without jurisdiction or decline to exercise it.

Cutting through the semantics of petitioners' arguments, the simple question is: must the Delaware courts be closed to TWA because the federal courts have held that they cannot grant TWA redress under the federal antitrust laws? The petition urges, under the several heads of *res judicata,* Fed. R. Civ. P. 41(b), the rule against splitting, and compulsory pendent federal jurisdiction over state law claims,

* Toolco's answer in the federal action was filed on February 14, 1962 (Del.App. A143-A200). The instant action was commenced on April 18, 1962 (Del.App. A7-A33).

that TWA, however clearly injured and uncompensated, must be barred from prosecuting its claims in the Delaware courts. The price of effectuating what petitioners call policies of "sound judicial administration" (Pet., p. 10) is to penalize TWA for having mistaken the forum in which it was entitled to seek relief. There would be nothing "sound" or just about a system of judicial administration which would thus discourage a litigant from seeking a federal forum by denying him relief anywhere else if his reasonable belief that the federal forum was available proves erroneous—particularly where, as here, the doctrines invoked in support of this result were developed by the courts many years after both the federal and state actions were filed.

The Delaware courts correctly applied the applicable doctrines of judicial finality

The true question presented by the petition is whether the Delaware courts accorded the federal judgment dismissing TWA's private antitrust action the finality required by the several doctrines of judicial finality upon which petitioners rely.* We submit that the Delaware courts properly applied each of these doctrines to the circumstances of this case.

1. *Res judicata.*

Simply put, the doctrine of *res judicata* provides that "a judgment 'on the merits' in a prior suit involving the

* As this Court held in *Stoll* v. *Gottlieb,* 305 U.S. 165, 170-71 (1938), the issue before the Delaware courts, although presenting a federal question, "was not one of full faith and credit." It is a question whether a state court has so misinterpreted the common law rules of judicial finality when applied to a federal judgment as to violate the supremacy clause.

same parties or their privies bars a second suit based on the same cause of action." *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326 (1955). "The requirement that a judgment, to be *res judicata*, must be rendered 'on the merits' guarantees to every plaintiff the right once to be heard on the substance of his claim." *Saylor* v. *Lindsley*, 391 F.2d 965, 968 (2d Cir. 1968). *See also Menendez* v. *Saks & Co.*, 485 F.2d 1355, 1364 (2d Cir. 1973), *cert. granted as to other issues sub nom. Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 416 U.S. 981 (1974) ("The doctrine of *res judicata* is subject to the overriding public policy that 'a party must not be deprived of an actual opportunity to be heard.'"); *La Societe Anonyme des Parfums Le Galion* v. *Jean Patou, Inc.*, 495 F.2d 1265 (2d Cir. 1974).

In directing dismissal of TWA's federal action, this Court made it plain that it was not ruling on the substance of TWA's claim for redress for the injuries inflicted on it:

> "The short of it is that in our view §§ 408 and 414 of the Act, as construed in *Pan American*, require reversal of the Court of Appeals and dismissal of this action. What TWA charged in its complaint was no more than the kind of conduct the CAB in 1950 had approved and authorized for the future; and, in any event, such conduct was within the power of the Board to control and was central to the mandate of § 408 to permit control of TWA by Toolco only if consistent with the public interest.
>
> "We by no means hold that the Federal Aviation Act completely displaces the antitrust laws. *Pan American*, 371 U.S., at 305. But where, as here, the CAB authorizes control of an air carrier to be acquired by another person or corporation, and where the CAB specifically authorizes as in the public interest specific transactions between the parent and the subsidiary, the way in which that control is exercised in those precise situations is under the surveillance of the CAB, not in the hands of those who can invoke the sanctions of the antitrust laws. The control which the CAB is authorized to grant or to deny under § 408 involves an appraisal of the impact of that control in terms of monopoly and competition; and the ongoing supervision entrusted to the CAB by § 415 is broad enough to put all transactions between parent and subsidiary—as originally conceived or subsequently exercised—under CAB supervision.
>
> "This conclusion necessitates a dismissal of the cross-petition, a reversal of the judgment below, and a remand with directions to dismiss the complaint, *as the numerous other points briefed and argued become irrelevant in that posture of the litigation.*" (409 U.S. at 388-89; emphasis added.)

As the Delaware Supreme Court held, the dismissal of TWA's federal complaint, then, was "on the merits" only in the sense that TWA's right of access to the federal courts to vindicate a federal right under the antitrust laws has been finally determined against TWA [App. 25a-26a, 336 A.2d at 575]. The CAB orders had the effect of conferring upon petitioners immunity from such an action. The issues raised in the instant petition, however, were explicitly not passed upon by this Court. It was therefore the duty of the Delaware courts to apply established doctrines of *res judicata* to determine if a judgment of dismissal bottomed on petitioners' immunity from suit under the antitrust laws had the collateral effect of barring TWA's state claims. The Delaware courts correctly applied the pertinent principles and authorized this case to proceed.

The cases dealing with *res judicata* demonstrate that a dismissal based upon the ground decided by this Court is "jurisdictional" in the broad sense of the term, *Costello* v. *United States*, 365 U.S. 265, 285 (1961), rather than a judgment "on the merits." For example, in *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), a final judgment on a cross-claim against the United States as representative for certain Indian Nations had previously been entered in a receivership proceeding in the Western District of Missouri. No appeal was ever taken from this judgment, entered in proceedings in which the parties were represented and in which the issues were apparently fully adjudicated. Yet this Court held that the prior judgment could not be *res judicata* in a later action, brought in the Eastern District of Oklahoma, because it had represented an adjudication of claims against which the United States was immune, and as to which the Indian Nations could be sued only in "any United States court in the Indian Territory." 309 U.S. at 513. The action taken by the Missouri district court, the Court said, had been "beyond its jurisdiction." The question whether the cross-claimants actually had a valid claim against the Indian Nations should be decided in further proceedings. 309 U.S. at 515-16. *A fortiori*, had the Missouri district court properly dismissed the earlier cross-claim on the ground that the United States was immune to such an action, that decision clearly would not have barred a subsequent claim on the same ground in the proper tribunal.

That precise question was involved in *American Guaranty Corp.* v. *United States*, 401 F.2d 1004, 1005 (Ct. Cl. 1968), in which the plaintiff sought to recover certain fees that it had deposited in the bankruptcy court during a proceeding for an arrangement under Chapter XI. A prior attempt by the same plaintiff to recover such funds, which

were in the custody of the United States, had been rejected on the ground of sovereign immunity. Terming the prior dismissal a decision on "jurisdictional" grounds, the Court of Claims held that the plaintiff was not barred or estopped by the doctrine of *res judicata.**

The essence of the rule is that where the prior dismissal was based on a ruling that the doors of a particular jurisdiction were closed to the plaintiff, it does not bar a second action in a forum that provides a remedy. A case like *United States* v. *California & Oregon Land Co.*, 192 U.S. 355 (1904), cited by petitioners (Pet., pp. 11-12, 14), is therefore irrelevant. In that case the ultimate issue sought to be presented to the second court—whether the United States or the California & Oregon Land Co. should have title to certain land—was identical to the ultimate issue before the first court and the first court had reached and determined it.**

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* In numerous other cases where an action has been dismissed because of the court's inability to grant a remedy, the dismissal has also been viewed as not being "on the merits". *See, e.g., Luker* v. *Nelson*, 341 F.Supp. 111, 114-15 (N.D. Ill. 1972); *Thommen* v. *Consolidated Freightways*, 234 F.Supp. 472 (D. Ore. 1964); *Kipbea Baking Co.* v. *Strauss*, 218 F.Supp. 696, 698-99 (E.D.N.Y. 1963).

** The other cases upon which petitioners rely also involved situations in which the party against which *res judicata* was held to operate had *actually* had his day in court and lost on the merits of his claim. *See, e.g., Norman Tobacco & Candy Co.* v. *Gillette Safety Razor Co.*, 295 F.2d 362, 364 (5th Cir. 1961) ("appellant has had its day in court"); *Grace* v. *Grace*, 394 F.2d 127, 128 (2d Cir. 1968) ("Having lost in the State courts, plaintiff commenced this federal diversity proceeding making essentially the same claims * * * that he had made before the Surrogate." An examination of the decisions in the *Grace* litigation demonstrates that the state court dismissal in question was comparable to the dismissal of Toolco's counterclaims in the federal action); *C&C Products, Inc.* v. *Fidelity & Deposit Co.*, 512 F.2d 1375 (5th Cir. 1975) (dispositive issue fully litigated on merits in prior action).

Petitioners' suggestion that the dismissal of TWA's federal action was "upon the facts" developed at the damage hearing

In the instant case, on the contrary, the issue determined by the dismissal of the federal action was whether TWA could recover for injuries suffered because of violations of the antitrust laws, while the issue presented to the Delaware courts is whether TWA could recover for injuries suffered by reason of petitioners' breaches of fiduciary duty to TWA and its minority stockholders. The latter issue was not presented to or decided by this Court in directing dismissal of TWA's antitrust action. As to the ultimate issue in both cases—the central issue if the end to be sought is a just determination of the dispute—whether TWA was in fact injured by petitioners' actions, that issue *was* presented to this Court, which expressly refused to pass on it. The lower federal courts, of course, had determined that ultimate issue in TWA's favor.

2. *Rule 41(b).*

The emptiness of petitioners' charge that the Delaware courts "refused to apply" Rule 41(b) of the Federal Rules of Civil Procedure (Pet., p. 12) is demonstrated by the treatment of Rule 41(b) in the opinions below [App. 11a-13a, 317 A.2d at 120-21; App. 26a-28a, 336 A.2d at 575-76]. Petitioners' real complaint is that the Delaware courts

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after this Court's initial refusal to review the denial of Toolco's motion to dismiss in 1965 (Pet., pp. 6, 13) is refuted by quotation in full of the very paragraph of the dissenting opinion by Mr. Chief Justice Burger upon which they rely:

> "But when parties to litigation reach that stage and the Court fails to respond with a decision on the merits, lawyers read that as a signal that the case should proceed. These parties did so—for nine years and more than 15 million dollars in legal expense—only to be told by the Court now that on the facts there is no legal liability—the very issue that could as well have been decided in 1964 as today. All of the litigation since 1964 has been confined to the massive task of determining damages and *it will not do to say that the Court could not resolve the legal issues until damages were ascertained. Precisely the contrary is true.*" (409 U.S. at 411-12; emphasis added.)

properly refused to transform the procedural guide which Rule 41(b) provides in construing federal court judgments into a rule of substantive law contrary to the express provision of the enabling act, 28 U.S.C. § 2072.*

In applying Rule 41(b) to this case, the Delaware courts did exactly what the Court of Appeals for the Second Circuit directed in *La Societe Anonyme des Parfums Le Galion* v. *Jean Patou, Inc.*, 495 F.2d 1265, 1275 n. 12 (2d Cir. 1974). Indeed this is an *a fortiori* case for the approach suggested in *Le Galion*. Here there was more than just "some evidence" that the dismissal may have been intended to be without prejudice (495 F.2d at 1275). TWA, in order to permit the district court to consider the non-preclusive effect of the dismissal and perhaps embody it in the formal language of the judgment of dismissal, applied to it for entry of a judgment which would expressly state that the dismissal was without prejudice to TWA's Delaware law claims. Judge Metzner denied TWA's application on the ground that he did not believe it necessary to go beyond the express terms of this Court's mandate in order to protect TWA's right to prosecute its non-federal claims [App. 39a *et seq.*, 359 F.Supp. 783].

Judge Metzner wrote:

> "It is clear that under Rule 41(b) a dismissal of the complaint, certainly as far as the federal claims are concerned, would be upon the merits. However, it does not follow that such a dismissal would be a bar to the non-federal claims. In the *Calderone* case, *supra*, [**]

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* The Delaware courts are not strangers to the principle embodied in Fed.R.Civ.P. 41(b), since, as the Delaware Supreme Court noted [App. 27a, 336 A.2d at 575], it is identical to Delaware Chancery Rule 41(b).

** *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

the complaint alleged federal claims and pendent state claims. The federal claims were dismissed on motion for failure to state a claim. The court pointed out that this action did not leave the plaintiff without remedy:

"'Since the federally-based claims were properly dismissed prior to trial, however, the pendent state claims must also be dismissed and the plaintiff relegated to the state courts for relief.' 454 F.2d at 1297. Interestingly enough, the order entered in that case did not dismiss the pendent claims without prejudice. I gather from this that such a safeguard is not necessary to protect whatever rights plaintiff may have in this regard. It might also be argued that, standing alone, the court is without jurisdiction of the state claims and thus the dismissal is for lack of subject matter jurisdiction which is not on the merits under Rule 41(b).

"Finally, a reading of the Supreme Court opinion clearly indicates the issue that was before the Court if a claim is ever made in the state court that the judgment to be entered here is a bar to that action.

"This court is obviously reluctant to amend the mandate of the Supreme Court, especially when there is doubt that such action is necessary to protect the interests of the parties. * * *" [App. 42a-43a, 359 F.Supp. at 785]

Rule 41(b), as is plain from its terms, provides a rule of construction in those circumstances where there is no other evidence of a federal court's intention in entering a judgment of dismissal. Where, as the Rule states, "the court in its order for dismissal otherwise specifies," it is necessary to turn to the court's order and opinion, if any, to determine whether the dismissal is "with prejudice" in the sense of "on

the merits." It is significant that Rule 41(b) does not direct the inquiry to the "judgment of dismissal," which under federal practice must be a separate document, Fed. R. Civ. P. 58, but to the court's "order for dismissal."

Rule 41(b) expressly reserves to the court the right to determine the extent to which a given judgment should be treated as being with or without prejudice. The above-quoted explanation provided by the district court was such a specification, which the Delaware courts were entitled to consider in applying Rule 41(b) to the federal dismissal.

It would truly be, in the words of the Court of Appeals in *Le Galion, supra,* "unduly harsh" to hold that Rule 41(b) foreclosed the Delaware courts from evaluating the federal court's intention in entering the judgment of dismissal. If, as it now appears, petitioners were not satisfied with the district court's decision, it was incumbent upon them (and not upon TWA, as they now facilely suggest) to have appealed from that decision or to have invoked the federal court's powers under the Anti-Injunction Act, 28 U.S.C. § 2283, which they discuss (Pet., pp. 3-4).

3. *Rule against splitting.*

The petition only once refers in terms to the rule against splitting a single cause of action (Pet., pp. 14-15). However, reliance upon that rule is fundamental to the entire petition and forms an essential bridge to petitioners' principal argument: that TWA was bound to have joined its Delaware law claims in the federal action on a theory of pendent federal jurisdiction but did not do so, and consequently TWA must be barred from prosecuting those claims in the Delaware courts. As we show hereafter, petitioners' argument depends upon an erroneous view of the doctrine of pendent jurisdiction. Even if their jurisdic-

tional analysis were correct, however, their knowing waiver of their right to assert such a defense while the federal action was still pending precludes them from raising it now after they have succeeded in having the federal action dismissed.

The rule against splitting a cause of action is primarily designed to protect a defendant from a multiplicity of suits, and a defendant may agree to a splitting of the cause of action or may by his conduct be held to have waived his right to insist upon application of the rule. *See* 1B J. MOORE, FEDERAL PRACTICE ¶ 0.410[2] (2d ed. 1974). Such a waiver will be presumed unless the defense of another pending action is timely and properly asserted. *See, e.g., Weekes* v. *Atlantic National Insurance Co.*, 370 F.2d 264, 270-72 (9th Cir. 1966); *Todd* v. *Central Petroleum Co.*, 155 Kan. 249, 124 P.2d 704 (1942); *Georgia Railway & Power Co.* v. *Endsley*, 167 Ga. 439, 145 S.E. 851, 854 (1928); *see generally, Annot., Waiver of, by Failing to Promptly Raise, Objection to Splitting Cause of Action*, 40 A.L.R.3d 108 (1971). This is but a specific instance of the general rule that the beneficiary of such judicial doctrines of finality may knowingly waive his rights thereunder. *Leonard* v. *Vicksburg, Shreveport & Pacific RR.*, 198 U.S. 416, 422-23 (1905).

This exception to the rule against splitting a cause of action is strongly endorsed in RESTATEMENT (SECOND) OF JUDGMENTS, Ch. 3 (Tent. Dr. No. 1, 1973), in § 61.2(1)(a), which provides:

> "(1) When any of the following circumstances exists, the general rule of § 61 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:

> "(a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; * * *." (p. 123)

The Comment on this section further elucidates the exception:

> "a. *Consent to or acquiescence in splitting.* A main purpose of the general rule stated in § 61 is to protect the defendant from being harassed by repetitive actions based on the same claim. The rule is thus not applicable where the defendant consents, in express words or otherwise, to the splitting of the claim.
>
> * * *
>
> "Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and in neither action does the defendant make the objection that another action is pending based on the same claim, judgment in one of the actions does not preclude the plaintiff from proceeding and obtaining judgment in the other action. *The failure of the defendant to object to the splitting of the plaintiff's claim is effective as an acquiescence in the splitting of the claim.*" (pp. 125-26; emphasis added.)*

The instant case is an *a fortiori* situation for application of this exception, since petitioners expressly acknowledged that they had considered putting forward the defense of the rule against splitting a cause of action, but decided

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* Compare RESTATEMENT OF JUDGMENTS § 62(c) and Comment (1942).

against doing so.* At a hearing held on July 10, 1963, while discussing whether discovery proceedings should continue in the Court of Chancery in light of the entry of an interlocutory default judgment by the federal district court in New York, counsel for petitioners made their strategy plain. Acknowledging that petitioners might have brought a motion to dismiss the proceedings in Delaware based upon the pendency of the federal action, petitioners' counsel stated:

> "But had we taken this step we would have been confronted with a possible inequitable result because while I believe we are entitled to seek an order dismissing this entire proceeding in the light of this final judgment which has been entered in New York, it would be inequitable to do so while there is a possibility of reversal.
>
> "It would require the parties, in the event of a reversal, to start over again. There are statute of limitation questions.
>
> "Therefore we believe that the equitable way of proceeding is to stay all further proceedings here until such time as the time when the Court of Appeals has acted, however it will act, and at that time there may or there may not be some other questions to be litigated, in Delaware or wherever else these parties may choose to go." [TWA App. A22-A23]

* Pendency of the federal action was clearly an affirmative defense, and Rule 8(c) of the Rules of the Delaware Court of Chancery requires all affirmative defenses to be pleaded. Petitioners' failure to do so for more than a decade not only constituted a waiver under Chancery Rule 12(h) as it read in 1962 and for many years thereafter, 13 DEL. CODE. ANN. (1953), but in light of the record of the 1963 proceedings must be held to have been a knowing and intentional waiver of the legal position belatedly asserted in their 1973 motion. *Weekes* v. *Atlantic National Insurance Co., supra,* 370 F.2d at 271.

Petitioners' counsel also stated:

> "To be sure, because of jurisdictional questions which are raised in the New York action, it could happen, depending upon what the Court of Appeals does, that there could be left some issues to be tried in the Delaware action." [TWA App. A15]

The Delaware courts have now determined that this action should proceed, with the express reservation of the question whether any particular issues were finally determined in the federal action [App. 35a, 336 A.2d at 579]. Petitioners are complaining of nothing more than having been taken at their word.

4. *Pendent federal jurisdiction.*

Probably because they are aware that the Delaware courts correctly applied the pertinent doctrines of finality in the unique circumstances of this case, petitioners' principal effort is to try to convince this Court that TWA was bound to have pleaded its Delaware law claims in the federal action filed in 1961 or be deprived of all rights to assert those claims elsewhere—a theory that can only be called compulsory pendent federal jurisdiction.

At a time when this Court and the lower federal courts have expressed growing concern for the nearly impossible burdens imposed on the federal judicial system by the number of essentially state-oriented disputes which are being brought in federal court, petitioners' interpretation of this Court's landmark decision in *United Mine Workers of America* v. *Gibbs,* 383 U.S. 715 (1966), hardly seems a preferable one, even if the *Gibbs* case would bear such a reading—which, we submit, it does not.

Although *Gibbs* greatly broadened what had been up to then understood to be the scope of a federal court's *power* under the doctrine of pendent jurisdiction, it did so explicitly in terms of a federal court's discretion to exercise that power. Indeed, with respect to a dismissal such as occurred in TWA's federal action, this Court stated that the power should *not* be exercised:

> "That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. • • • *Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.*" (383 U.S. 726; emphasis added.)

Thus *Gibbs* emphasizes that the power of the federal court to entertain a state claim in the absence of diversity is a discretionary power, and one moreover that should *not* be used when, as here, the federal claims are dismissed before trial.* It would be perverse indeed to deduce from *Gibbs* a mandatory requirement that a complainant such as TWA, if it presses a federal claim at all, must bring all state claims also in the federal court, which might

* Both before and after *Gibbs*, courts recognized that this was a critical test to be passed before a federal court *should* assume to exercise pendent jurisdiction over state law claims, in situations where the naked power to do so was thought to exist. *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497, 501 (1st Cir. 1950); *O'Neill* v. *Maytag*, 339 F.2d 764 (2d Cir. 1964); *T. B. Harms Co.* v. *Eliscu*, 339 F.2d 823 (2d Cir. 1964), *cert. denied*, 381 U.S. 915 (1965); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). Recent refinements of the *Gibbs* rule where this Court has found special justification for accepting jurisdiction over pendent claims, *e.g.*, *Hagans* v. *Lavine*, 415 U.S. 528 (1974) (pendent federal law claim), do not signal a departure from the essential thrust of *Gibbs*.

or might not hear them, instead of in the state court which has both unquestioned jurisdiction and the duty to exercise it.

In early 1962 Toolco's claim of immunity to the antitrust action because of CAB orders had been raised by motion and by answer. It seemed certain that the sufficiency of this defense would be determined before any trial of the merits—as in fact occurred, although only after delays not anticipated by the parties. Under the case law as it then stood, which in this respect was not altered by *Gibbs*, it appeared that if this defense should be upheld any pendent state claims would be dismissed and left to the state courts to determine—yet a state court action brought thereafter might be barred by limitations or laches. By filing the instant action in the Delaware courts TWA sought protection against finding out that Toolco's CAB defense precluded an antitrust action too late to seek a state court remedy. In view of the actual outcome of the federal action, to argue that the state court action is barred anyway because it could have been heard in federal court had the CAB defense *not* been determined until after a trial on the merits is to distort utterly the teaching of *Gibbs*.

Even if petitioners were correct that a collateral result of *Gibbs* is to create some form of compulsory pendent federal jurisdiction, requiring all claims arising out of the same factual situation to be brought in federal court if one is brought there, whether or not the federal claim itself is disposed of before trial, the result in this case should not be affected.*

* That such an estoppel rule "may ultimately result" is suggested in Note, *UMW* v. *Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657, 672 (1968). The very suggestion demonstrates its prior absence, and surely to apply such a rule retroactively to actions commenced before the *Gibbs* decision would be completely unjustified.

TWA's federal action was filed in 1961, and it was not until five years after that that this Court in *Gibbs* reformulated the doctrine of pendent jurisdiction, expanding greatly the scope of its permissible exercise over that generally recognized in prior years, when courts and litigants relied upon the teaching of *Hurn* v. *Oursler,* 289 U.S. 238 (1933). 13 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3567, at p. 443 (1975) ("It would be unprofitable to examine the problems in applying Hurn * * *, since [*Gibbs*] changed the law in this area so significantly that pre-1966 cases are now of historical interest only."); Note, *UMW* v. *Gibbs and Pendent Jurisdiction,* 81 HARV.L.REV. 657 (1968).

TWA drafted its complaint under the guidance of *Hurn* and cases applying it.* Assuming *arguendo* that under

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* The rule announced in *Hurn* depended upon whether the same "cause of action" was involved in the two claims. After pointing out as significant the "identical facts" involved in certain claims for copyright infringement and unfair competition, the Court in *Hurn* cautioned that identity of facts was not the only criterion (289 U.S. at 246): It quoted with approval the definition embodied in the following statement from *Baltimore S.S. Co.* v. *Phillips,* 274 U.S. 316, 321 (1927):

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong."

In these terms, TWA's right to be free from injury to its business or property as a result of violations of the antitrust laws can hardly be argued to have been the same as its right to be free from petitioners' self-dealing, misappropriation of corporate opportunities and breaches of fiduciary duty. *Compare Williamson* v. *Columbia Gas & Electric Corp.,* 186 F.2d 464 (3d Cir. 1950), *cert. denied,* 341 U.S. 921 (1951), upon which petitioners rely (Pet., pp. 12, 13-14), where the Court of Appeals stated:

> "Thus we have two actions pending by the same plaintiff against the same defendant in the same court, each involving a suit for recovery of injuries alleged to have been sustained by action on the part of the defendant in violation of the anti-trust laws of the United States." (186 F.2d at 465-66)

some circumstances the huge scope of the discretionary pendent federal jurisdiction as defined in *Gibbs* might be compulsory upon a would-be federal plaintiff, it would be wholly inappropriate to read into *Gibbs* some 14 years later a retroactive effect that would "* * * deprive the respondent of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable." *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 108 (1971).

The Delaware courts concluded that TWA is entitled to its day in court on its common law claims against petitioners. We submit that in law and as a matter of simple justice that conclusion is fully justified.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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